TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 276

ROBERT C. HERD & COMPANY, INC., PETITIONER,

vs.

KRAWILL MACHINERY CORPORATION, KRAUS MANUFACTURING CORPORATION AND ENGINEERING INDUSTRIES INTERNATIONAL, S.A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 14, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

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TESTIMONY

(Tr. pp. 7-11):

GEORGE WILKERSON,

was called as a witness for and on behalf of the defendant Herd and, having been first duly sworn, was examined and testified as follows:

* * * * * *

DIRECT EXAMINATION

By Mr. Whip:

Q. Mr. Wilkerson, by whom are you employed? A. The R. C. Herd Steamship Company.

Q. How long have you been with them, approximately? A. Approximately around twenty years.

* * * * * *

Q. And what do you do with R. C. Herd & Company? A. I am a gang leader.

* * * * * *

Q. (Mr. Whip) A gang leader of what? A. Loading and unloading ships.

Q. Stevedoring, in other words? A. That's right.

Q. You are a stevedore? A. Yes.

Q. Now, Mr. Wilkerson, do you recall loading a vessel the CASTILLO AMPUDIA? A. Yes.

Q. In the middle of April 1954? A. Yes, sir.

Q. Do you recall that a case of goods was dropped while you were loading this steamer? A. Yes, sir.

Q. Well, now, tell us, just describe what happened in the matter of dropping that case. A. Well, this case was sitting upright on the railroad car, and you had to put wires, slings around it to lift it, and as it was sitting directly flat on the car, so we had to work a strap underneath of it the best we could to raise it up a little to get a chock underneath it.

* * * * * * *

(The Witness) We had to raise this case a little in order to get the chock under it. Now, a chock is another piece of timber, which would be a two by four or four by four.

That was in order to get the sling around the case, but this particular strap was on the corner.

Q. (Mr. Whip) Now, the strap you talk about — A. The sling.

Q. The sling. What was that attached to? A. It was attached to the Bethlehem crane.

Q. The crane that you had secured from Bethlehem to load this cargo? A. Yes.

Q. All right. Tell us what happened. A. And we got this sling around one corner and wanted to raise it a little, raise it to get the chock underneath it, but when he did raise it, he went too high with it, and that caused it to topple over.

Q. You say when he did raise it, who was it that raised it? A. The Bethlehem crane man.

Q. The man who was operating the crane? A. Yes.

Q. Now, this ship, was she alongside the pier? A. Yes.

Q. Do you know what pier it was? A. Pier 8, Canton.

Q. And you were taking the cargo from cars that were run out on that pier; is that correct? A. Yes.

Q. And you were loading from the cars to the ship? A. Yes.

Q. Now, where was the crane? Was the crane next to the pier or on the other side of the ship? A. On the other side of the ship.

Q. And the crane had the sling over the ship down onto the cars which were on the pier? A. Yes.

Q. And you got one sling under one side of this case; is that correct? A. Yes, sir.

Q. Then to whom did you give the signal, to the man who was operating the crane to raise the case? A. To my deck man, Jenkins.

Q. Your deck man, Jenkins. Where was he stationed? A. He was stationed on the deck.

Q. On the deck of the ship? A. Yes.

Q. And you gave the order to Jenkins to raise away? A. Yes.

Q. And then it was Jenkins' duty to pass that signal on to the crane man? A. Yes.

Q. You said you gave the signal after you had this sling under this case, you gave the signal to the deck man to raise away; correct? A. Yes, raise it a little.

* * * * * *

(Tr. p. 12):

Q. (Mr. Whip) Did the crane man do that? A. Did he do that?

Q. Did he raise it? A. Yes.

Q. All right, just tell us what happened when he began to raise this case. A. When he began to raise the case, when he got it to the height that I wanted, I gave the signal to stop to Jenkins, and he give it to the crane man, but he did not stop.

Q. Then what happened? A. The case bumped against the ship.

Q. The case came over against the ship? A. Yes.

Q. What happened then? A. The weight of the case pushed the ship out, away from the dock.

Q. Well, did or didn't the case fall out of the sling? A. Did the case fall out of the sling?

Q. Yes. A. He raised the case so high the sling freed itself.

* * * * * *

(Tr. p. 13):

Q. (Mr. Whip) Well, now, Mr. Wilkerson, did or did not this crane raise this case after you had placed this sling under it? A. Yes, sir.

* * * * * *

(Tr. p. 17):

When this man, this crane man raised the case up, it was raised too high. He did not stop, and the case leaned over, that freed the sling out, and the case went against the ship, pushed the ship away from the pier, so when the case, what was in it, the description of it, I don't know because it was a box, big like this one, and I don't know what's in it.

Q. (Mr. Whip) Now, tell us, Mr. Wilkerson, what kind of sling it was that you put under the case. A. It was a wire sling.

Q. A wire sling, attached to the crane? A. Yes.

* * * * * *

(Tr. pp. 33-36):

CALVIN E. JENKINS,

was called as a witness for and on behalf of the defendant Herd and, having been first duly sworn, was examined and testified as follows:

* * * * * *

DIRECT EXAMINATION

By Mr. Whip:

Q. For whom do you work? A. R. C. Herd Company.

* * * * * *

Q. (Mr. Whip) You work for Robert C. Herd Company? A. Yes.

Q. What do you do? What kind of work? A. I'm a deck man.

Q. Stevedore? A. Yes.

Q. How long have you been working for Robert C. Herd & Company? A. About eleven years.

Q. About eleven years? A. Yes.

Q. Did you have anything to do with this loading of this ship CASTILLO AMPUDIA on about April 14th, 1954? A. I did.

Q. Do you recall the incident of the case going overboard? A. Yes, sir.

Q. Now, tell us what you had to do with this situation at that time? A. Well, I was on the deck.

Q. What were you? A. I was deckman.

Q. You were a deck man? A. Yes.

Q. Where were you situated? A. I was standing on the deck over the top of this case.

Q. You were standing on the deck of the ship? A. Yes.

Q. The ship was alongside of the pier? A. Yes, alongside the pier.

Q. And this case was on the railroad car? A. Yes.

Q. Which was on the pier? A. Yes.

Q. Now, you were using the crane; is that correct? A. Yes.

Q. Where was the crane? A. Was off shore.

Q. On the other side of the ship? A. Yes.

Q. And the crane tackle came over the ship? A. Yes.

Q. And came down to the cargo which was on the flat car? A. Yes.

Q. And you were stationed on the ship to relay orders were you? A. Yes.

Q. From whom would you get your orders? A. Mr Wilkerson.

Q. To whom did you give the orders? A. To the crane operator.

Q. To the crane operator? A. Yes.

Q. Well, now, tell us what you know about this case going overboard? What did you have to do with it? Tell us the signal you had from Mr. Wilkerson, if any, and the signal you gave to the crane operator. A. Well, Mr. Wilkerson was standing on the pier by the case, and when he gave me the signal to go ahead, I relayed it to the operator to go ahead.

Q. To go ahead? A. Yes.

Q. What did you mean by that? A. Just to raise it a little.

Q. Raise it? A. Yes.

Q. What kind of signal did you give him? I don't know A. A straight up signal.

Q. Does that signal mean to raise or raise it a little? A Raise a little.

* * * * * *

(Tr. pp. 37-40):

Q. (Mr. Whip) And you gave the crane operator the signal to move? A. Yes.

Q. To raise? A. Yes.

Q. To raise what? A. To raise the case a little.

Q. A little? A. Yes.

* * * * * *

Q. (Mr. Whip) Raise slowly? A. Yes.

Q. All right. What did the crane operator do, if anything? A. Well, he went ahead on it, he started up, and I got the signal there to stop, and I slowed my hands for him to stop, and he kept on going.

Q. How long has he been raising this case when you received the signal from Mr. Wilkerson to stop? A. Well, the crane doesn't seem to move too fast when you start. I guess it's around about two or three minutes.

* * * * * *

Q. (Mr. Whip) Is that what you mean, that the crane operator had been raising this case two or three minutes slow? A. He was raising it slack on the fall, on account of the weight of the case.

Q. You mean from the time he started to get the slack out of the fall— A. Yes.

Q. —until the time you gave the signal to stop was about two or three minutes? A. Yes.

Q. Is that what you mean? A. Yes.

Q. Could you see the case on the railroad car from where you were standing? A. I could see the case, yes.

Q. Could you see how far up the crane man had raised the case? A. No, I could not.

Q. When you received the signal to stop? A. No, sir, I could not. I was getting my signal from Mr. Wilkerson.

Q. Could you see whether the case had been raised at all when you received the signal to stop. A. I could see it moving from the top but I couldn't see how high it was.

* * * * * *

Q. (Mr. Whip) When you received the signal to stop you knew that the case had been raised? A. Yes, didn't raise high enough.

Q. Then you received the signal from Mr. Wilkerson to signal the crane operator to stop? A. Yes.

Q. Now, did you or did you not give the signal to the crane operator to stop? A. Yes.

Q. Just how did you give that signal? A. Like that, my hand out.

Q. Does that mean to stop? A. Yes.

Q. Did the crane operator stop? A. No, sir.

Q. Wait a minute — stop lifting the case? A. No, the case kept on up, and the strap fell off after, and after the case gets up high, the strap come off the case.

* * * * * *

(Tr. pp. 60-63):

DONALD W. CARROLL,

was called as a witness for and on behalf of the defendant Herd and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Whip:

Q. Mr. Carroll, by whom are you employed? A. Robert C. Herd & Company.

Q. How long have you been employed by that company? About? A. About twelve years.

Q. And what is your position with the company? A. Superintendent.

Q. What kind of superintendent? A. Stevedore superintendent.

Q. Stevedore superintendent. A. Yes, sir.

Q. Now, Mr. Carroll, this case is concerned with the loading of a ship, the CASTILLO AMPUDIA on or about April 14, 1954. Are you familiar with that operation? A. Yes, sir.

Q. What, if anything, did you have to do with it? A. Well, after we finished loading the rails that day, I knew that we needed a heavy lift crane to put these boxes aboard, so I ordered the same from Bethlehem Steel Company.

Q. Is that the usual practice with your company when you need heavy lifts to order it from Bethlehem Steel or somebody else? A. That's right.

Q. Now, tell us where this ship was berthed? A. Pier 8, Canton Railroad.

Q. How did the cargo arrive for the ship? A. This particular cargo arrived on cars on the track next to the pier.

Q. And you had, of course, other cargo for the ship on the pier? A. Yes.

Q. Tell us something about the nature of the ship. The Court would like to know how long or how large the ship was and what was the length, beam. A. Well, I would say she was about seven thousand tons. That is, approximately, and about fifty feet wide, and four hundred and thirty-five feet long.

Q. How many holds does she have? A. Five hatches.

Q. Five hatches? A. Yes.

Q. Can you tell us into what hatch this particular case which dropped into the water was to go? A. As I recall, it was the number two hatch.

Q. Mr. Carroll, did you see this cargo come down to the pier on these flat cars? A. No, I left the ship around two or three o'clock to go to another ship, and they were loading rails at the time.

Q. Well, I mean, had these heavy cases — were they on the pier? A. To my knowledge they were not on the pier, the heavy cases when I left the pier. They were ordered in later.

Q. Ordered in later. Now, when the cargo, the cases came down alongside the ship to the pier on the railroad car, I suppose, of course the railroad has released those

cases or cargo to the ship at some time; is that correct? A. The railroad will not place the cars alongside the ship until they are released to the steamship. The railroad will not place the cars alongside the ship to be loaded until they are released.

Q. In other words, when you load from the railroad car, then the railroad has released the cargo to the ship? A. That is correct.

Q. Well, you were not present at the time this heavy case was being loaded on this ship, I take it? A. No, sir.

Q. Did you ever see this case before which was spilled out into the harbor? A. As I said before, I don't recall seeing it. There may have been eight or ten cars alongside the pier that day, and when I left the ship about two or three o'clock to go to another ship, when I got back the case was already overboard.

Q. And then you only know what was done with the case that had dropped overboard, what happened to that? A. Yes, that is all I can tell you.

* * * * * * *

(Tr. p. 64):

CROSS EXAMINATION

By Mr. Fisher:

Q. Mr. Carroll, you got there after the case was overboard. What happened then? A. Well, I immediately contacted Bethlehem Steel and arranged to get the case picked up out of the water.

Q. And did you see them recover this thing from the water? A. Yes, I did.

Q. And what was it? A. It was a press, a fifty ton press as I recall it.

Q. And what, can you describe what that thing was like with respect to whether it was heavy at the bottom or thinned or rounded or anything about that? A. Well, the main thing, it might have been a little heavy at the top.

but it was heavy all the way through to the base, and when upright, it was about eleven or twelve feet high.

Q. Do you know how wide it was? A. Eight or nine feet and maybe six feet — eight or nine feet long.

* * * * * *

(Tr. p. 68):

REDIRECT EXAMINATION

By Mr. Whip:

Q. Mr. Carroll, it's true, isn't it, that this case that went overboard was one case of a shipment of sixty-two cases on the same ship; is that correct? A. Yes, as far as I know, yes.

Q. Well, did you see any of the other cases, similar cases, while they were still on the flat cars? A. Yes, I did.

Q. Can you tell us about the size of this particular case? Were all the cases of the same size? A. This case was much larger and heavier than the other cases.

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(Tr. pp. 69-74):

EDWIN L. HACHTEL,

was called as a witness for and on behalf of the defendant Herd and, having been first duly sworn, was examined and testified as follows:

* * * * * *

DIRECT EXAMINATION

By Mr. Whip:

Q. By whom are you employed? A. Robert C. Herd & Company.

Q. How long have you been employed by that company? A. Since 1930.

Q. What is your position with that company? A. Operating manager.

Q. Now, Mr. Hachtel, this vessel, the CASTILLO AMPUDIA, what did you have to do with this vessel, and where did you get your instructions? A. We were han-

dling the vessel for Garcia & Diaz who were our principals in New York City.

Q. Who are Garcia & Diaz? A. They are the general agents for this Spanish Line, the name of which is on that bill of lading, which is kind of hard to pronounce.

Q. You had acted on behalf of Garcia & Diaz before? A. Yes, we still do.

Q. You still do? A. Yes.

Q. You had represented the ship before? A. Yes, we had.

Q. What were your instructions? A. To load and discharge a certain amount of cargo which New York outlined to us.

Q. And when you got those instructions, whom did you contact? A. Mr. Carroll.

Q. What were your instructions to Mr. Carroll? A. I listed the instructions that is to be loaded on the ship, the car number, what the cars contained, when it arrived, and what railroad.

Q. And you had some cases for— A. Krawill.

Q. —Krawill and Company. Do you remember how many cases of cargo you had? A. There were a total of sixty-two, I believe.

Q. Now, did you or did you not prepare these bills of lading I show you? One for fifty-one cases and one for eleven cases? A. I did not prepare them, no.

Q. Well, did you sign them? A. I signed them.

Q. Upon whose authority? A. The authority granted to us by the Master, and also by Garcia & Diaz.

Q. Your name is down there? That's your name, isn't it? A. Yes, that's correct.

Q. Now, on this bill of lading which covers eleven of those cases, there is a notation there. What is that nota-

tion? A. "One case dropped overboard by crane now at Canton Railroad."

Q. Who put that on there? A. I put that on there.

Q. These bills of lading I note are dated April 14, 1954? A. That's correct.

Q. Do you know when this cargo was loaded on the ship? A. On the 14th of April 1954.

(Mr. Whip) I offer these.

(Mr. Clerk) You offer these?

(Mr. Whip) Yes.

(The Clerk) Defendant Herd Exhibit 1-A and 1-B.

(Bills of lading were marked Defendant Herd Exhibits 1-A and 1-B.)

Q. (Mr. Whip) What is your practice in cases of this kind? What do you do with the bills of lading? A. The original bills of lading in this particular instance were mailed to Garcia & Diaz in New York.

Q. This is a general shipment? A. General cargo shipment, yes.

(The Court) You say you mailed the bills of lading to Garcia & Diaz?

(The Witness) Yes, that's correct.

(The Court) Well, what went to Krawill?

(The Witness) I'm sorry.

(The Court) What went to Krawill?

(The Witness) I didn't know Krawill in it at all. The documents came to us from J. H. Vaughan who was the Customs House Broker and freight forwarder in New York with the shipper's export declaration and license to the bill of lading, and the bill of lading was returned to our principals, Garcia & Diaz, for release to the shipper on teletype.

Q. (Mr. Whip) Do you know when the cargo came off the railroad? A. Yes.

Q. And do you know when that cargo was released to the ship? A. No, I don't know exactly what time the cargoes were released to the ship. In most instances the cargo was assigned to the ship for us to be notified on the arrival of the cargo so we could load it into the ship.

Q. Well, you can't get the cargo until the railroad releases it to you? A. That's right. We order the cargo — I don't order it, but the outside department, the stevedoring department, orders the cars alongside the ship for whatever time they designate.

Q. And you are notified of that? A. I did not get that.

Q. I say, you order the cars, when the cars arrive, you have notice that the cars have been delivered? A. No, you see, I do not order the cars alongside the ship. I know the cars arrive, and I release them to the pier, and the pier orders the cars alongside the ship whenever they desire them.

Q. That is, the piers? A. Yes.

Q. And they are down at the pier? A. Yes.

Q. Well, that's the railroad company in this case, isn't it? A. No, you see our outside or stevedoring department would give orders to the railroad to place certain cars at certain times alongside of certain hatches.

(The Court) I don't understand that anybody questions that the goods had been released by the railroad to the ship before Herd started to take this crate or case off the cars.

* * * * * *

(R. pp. 61-62):

STIPULATION

IT IS STIPULATED by and between Krawill Machinery Corporation, plaintiff (hereinafter called Krawill), and Robert C. Herd & Co., Inc., defendant (hereinafter called Herd), that:

1. John H. Faunce, Inc. (hereinafter called Faunce), freight forwarders who handled Krawill's shipment, prepared all bills of lading involved in the shipment and delivered them to Garcia & Diaz, Inc., general agents in New York for the owner of the SS CASTILLO AMPUDIA (hereinafter called Garcia), for signature. Such bills of lading were then in the form of defendant's Exhibit 1-A before the inked notations were written thereon. After the original bill of lading had been signed, the original bill of lading and copies thereof, one of which was plaintiff's Exhibit 1, were delivered in New York by Garcia to Faunce. Faunce in turn delivered the original bill of lading and copies to one Graul, a representative of Krawill, who took the original bill of lading to the New York bank upon which the consignee's letter of credit was drawn. Before delivery of the bill of lading, Garcia had informed Faunce that one case had been dropped and that the bill of lading would be changed to read ten cases instead of eleven, and when delivered the bill of lading had been so changed, so that it was then in the form and with the corrections shown on plaintiff's Exhibit 1. Garcia neither asked for nor received the consent of Faunce or of anyone representing Krawill to make such a change in the bill of lading.

2. Herd had no written contract with Garcia or with the owner of the ship. Herd has been doing business with Garcia for many years, but never on the basis of a written contract. In the course of their dealings there had been no mention that Herd's charges for stevedoring would vary with any declared value of the cargo. In fact, Herd's charges are not based on any declared value, but are in accordance with its usual tariff which provides different rates for different commodities. Such rates are predicated upon weight, density, difficulty of handling and other factors affecting the cost of doing the stevedoring work.

3. It is not the custom in the port of Baltimore for stevedores to make any difference in their rates depending upon the declared value of the items handled. The rate charged by stevedores is based on the commodity handled and varies from commodity to commodity, depending on

the weight, density, difficulty of handling and other factors affecting the cost of doing the stevedoring work, without variation as to similar items of the same commodity because there may have been a declaration of value with respect to some items and not as to others.

WILLIAM A. GRIMES,
OBER, WILLIAMS, GRIMES & STINSON,
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LORD, WHIP & COUGHLIN,
Attorneys for Robert C. Herd & Co., Inc.,
Defendant.

(R. pp. 655-674):

OPINION OF COURT
(Filed October 24, 1956).

Thomsen, Chief Judge

This is a suit by a shipper against a stevedore and the owner of a floating crane to recover for damage to a heavy press sustained when the case in which it was enclosed fell into Baltimore harbor while it was being loaded from a railroad car onto a ship. The issues are: (I) which defendent was negligent; (II) whether, as defendants contend, either (A) the contract between the plaintiff shippers and the carrier, or (B) the Carriage of Goods by Sea Act, 46 U.S.C.A. 1300 et seq.; commonly called Cogsa, limits the liability of either or both defendants in this suit to $500; and, if not, (III) the amount of the damages.* Plaintiffs contend (A) that there was no contract between the shipper and the carrier which extended any such limitation of liability to either defendant, and (B) that Cogsa does not apply so to limit their liability (1) because no bill of lading covering the press was ever issued, (2) because

* It was agreed that evidence with respect to the amount of damages claimed by shippers should not be presented until the other issues are finally decided.

the damage did not occur within the period "from the time the goods are loaded on to the time when they are discharged from the ship", 46 U.S.C.A. 1301(e), and (3) because neither defendant is a "carrier" or a "ship", and is therefore not entitled to the benefit of the Act.

FINDINGS OF FACT

Plaintiffs, in fulfillment of a contract with a Spanish company, Comercio, Industria y Transportes, S.A., shipped various items of machinery and equipment from Detroit to Spain via Baltimore. Plaintiff, Krawill Machinery Corporation (Krawill), has succeeded to the rights of the other plaintiffs.

The shipment consisted of 62 cases, which moved by rail and truck from Detroit to Baltimore, where they were to be loaded onto the S.S. Castillo Ampudia for carriage to Valencia, Spain. One case, which contained a large press, weighed 19 tons.

John H. Faunce, Inc. (Faunce), freight forwarders who handled Krawill's shipment, prepared all bills of lading involved in the shipment and delivered them to Garcia & Diaz, Inc. (Garcia), general agents in New York for the owner of the S.S. Castillo Ampudia, for signature. The bills of lading were on the printed forms of Compania Transatlantica Espanola, S.A., Garcia & Diaz, Inc., agents.

After each original bill of lading had been signed by the carrier's Baltimore agent, the original and several copies were delivered in New York by Garcia to Faunce. Faunce in turn delivered the original bill of lading and copies to Graul, a representative of Krawill.

One of the bills of lading was drawn by Faunce to cover eleven cases, including the heavy case involved in this action. After that bill of lading had been signed by the carrier's Baltimore agent, but before its delivery to Faunce, Garcia informed Faunce that one case had been dropped and that the bill of lading would be changed to read ten cases instead of eleven. When delivered by Garcia to Faunce the bill of lading had been so changed, and the figures

stating "shipper's gross weight" in kilos and in pounds had been correspondingly reduced. Garcia neither asked for nor received the consent of Faunce or of anyone else representing Krawill to make the change in the bill of lading, but it does not appear that anyone ever made any objection to the change.

Each of the bills of lading contained, among others, the following printed provisions:

> "7. The Carrier's responsibility in respect of the Goods as a Carrier shall not attach until the Goods are actually loaded for transportation upon the Vessel, and shall terminate, without notice, as soon as the Goods leave the Vessel's tackles at destination or other place where the Carrier is authorized to make delivery or end its responsibility. Any responsibility of the Carrier in respect of the Goods attaching prior to such loading or continuing after leaving the Vessel's tackles as aforesaid, whether the Goods are in course of lighterage by the Carrier or however else the same may be situated, shall be the same only as that of a Warehouseman, without liability on the part of the Carrier, except for want of ordinary care; and all conditions, exceptions and limitations of the liability of the Carrier, contained in this contract shall be deemed to apply also to such Warehouseman's liability as well as to liability as a Carrier. * * *
>
> "30. In consideration of a choice of freight rates having been offered to the shipper by the Carrier, it is agreed that in case of loss of, or damage to * * * goods of an actual value exceeding $500 * * * per package or, in case of goods not shipped in packages, per customary freight unit, the value of such goods, shall be deemed to be $500 per package or per said unit and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per said unit and pro rata in case of partial loss or damage, unless the nature of such goods and a value higher than $500 per package or per said unit shall have been declared in writing by the shipper upon delivery to the Carrier and noted on the face hereof and unless payment of the

extra freight charge incident thereto shall have been made or promised * * *, in which case such declared value, or the actual value if less, shall be the basis for computing damages and any partial loss or damage shall be adjusted pro rata. * * *

"37. This bill of lading shall have effect subject to the Carriage of Goods by Sea Act of the U.S.A. and the carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act. To the extent that any term of this bill of lading is repugnant to or inconsistent with anything in such Act, it shall be void."

Robert C. Herd & Co., Inc. (Herd), the stevedore, had no written contract with Garcia or with the owner of the ship. Herd has been doing business with Garcia for many years, but never on the basis of a written contract. In the course of their dealings there had been no suggestion that Herd's charges for stevedoring should vary with any declared value of the cargo. Herd's charges are not based on any declared value, but are in accordance with its usual tariff, which provides different rates for different commodities. Such rates are predicated upon weight, density, difficulty of handling and other factors affecting the cost of doing the stevedoring work. This is in accordance with the custom in the port of Baltimore.

The case enclosing the heavy press and other equipment was 8 feet wide, 5 feet long, and 11 feet high. It was loaded onto a flat car, with the press bottom end up. The case rested on two wooden skids, 4 x 4's, 8 ft. long, to which it was bolted. The skid ran across the car. The railroad company carried the case onto the Canton Railroad Pier, on a track which ran about 4 ft. from the side of the pier to which the S.S. Castillo Ampudia was moored, and released the case to Herd. Herd's operating manager realized that the case was too heavy for the ship's gear, and arranged with Bethlehem Steel Company to have a floating derrick, owned by Bethlehem and operated by its employees, come alongside the ship to assist in loading the case.

The derrick arrived about 1 p.m. on April 14, 1954, the day of the accident, and tied up on the offshore side of the ship opposite the #2 hold, into which the case was to be loaded. The crane operator was told that the case was not to be loaded until about 2 p.m., so he left the barge which carried the crane, went onto the deck of the ship, and looked at the case. He then returned to his barge and swung the boom of the crane over the ship so that the hook and the gear were over the flat car.

The floor of the operator's control room was about level with the main (weather) deck of the ship; the crane operator could not see the flat car or the crate from where he stood to operate the crane, and it was necessary for Herd's deckman to relay to the crane operator the signals he received from Herd's gang carrier on the pier.

Herd's operating manager was on the pier, but did not concern himself with the loading of the case after the floating derrick had been ordered. A gang carrier, Wilkerson, who had worked for Herd for twenty years, was in charge of the loading operation. Of his gang of fifteen men, four were on the pier with him, one was on the deck, and the rest were in the hold.

Wilkerson found that he could not get the regular wire sling under the crate on the flat car because the wire was too thick. He therefore decided to work a thinner wire under the shore end of the skids, attach this thinner wire to the hook of the crane, and have the crane lift or tilt the case sufficiently high for him to slide the regular sling under the skids, or to place one or more chocks under the skids so that the regular sling could be placed around the case.

Such an operation is not unusual when stevedores are loading heavy machinery with the aid of a derrick. The crane operators know that the first lift he would be called upon to make would be a relatively short one, but he did not know and was not told how short it was to be.

Wilkerson, the gang leader and responsible representative of Herd at the time, did not realize the peculiar diffi-

culties of this particular job. Those difficulties were occasioned by two facts, which were or should have been known to him: first, that the case stood on the flat car with its largest dimension its height, and did not lie on its side, with its largest dimension on the floor of the car, as is customary; second, that the press was upside down in the case, with the heavy bottom portion of the press in the air. Each of these factors made it top heavy, and since Wilkerson planned that the preliminary lift would give the case a tilt toward the ship, there was far more than the usual danger that the case would be tilted to the point where its center of gravity would shift and cause it to fall toward the ship.

This situation called for unusual care on the part of the gang leader, to see that the case was not lifted too high. He testified that he intended a lift of only 2 to 4 inches, but he did not tell this to the crane operator. The experienced crane operator knew that a short preliminary lift was probable, but he did not know how short it was to be, nor how unusually ticklish the situation was. The gang carrier gave the customary continuing hand signals to the deckman, and the deckman relayed them to the crane operator. Neither the deckman nor the crane operator was young, and the normal reaction time for each was at least ¾ of a second. The boom of the crane had to rise long enough to take up the slack in the wire, to grip the case, and to raise it the required distance. It was necessary for the gang carrier to give the signal to stop lifting with more than the usual promptness, because he knew or should have known that the crane would continue to lift for at least 1½ to 2 seconds after he gave his signal.

The operation could have been more safely performed with a jack, such as Bethlehem uses in similar operations. Stevedores do not customarily use jacks for this type of operation, nor do they customarily take special precautions to keep the load from going off balance. The operation was conducted in the usual way, but without recognition by the gang carrier of the unusual dangers and without his taking any adequate steps to prevent the accident. I find Herd negligent in the planning of the operation.

The deckman was not negligent in transmitting the signals, and the crane operator was not negligent in putting them into effect. If there was any unreasonable delay beyond the normal reaction time, I find that such delay was the delay of Wilkerson in not giving the "stop" signal as soon as he saw the side of the case start to rise from the floor of the flat car. The deckman testified that when he got the "stop" signal from Wikerson he could see the case moving, but could not say how high it was. I find that Wilkerson did not change the signal from "raise" to "stop" as soon as the case started to tilt, but waited too long, because of his failure to make allowance for the normal reaction time of the deckman and the crane operator.

CONCLUSIONS OF LAW AND DISCUSSION.

I. The damage was caused by negligence on the part of Herd and not by any negligence on the part of Bethlehem.

II. The general rule is that a person is liable for all pecuniary damages proximately caused by any negligence with which he is chargeable. Any limitation of such liability must be based upon some contract, statute, or rule of law, of which he is entitled to claim the benefit.

In the case at bar Herd had no contract with the plaintiff shippers. Its contract with the carrier, made through the carrier's agent, Garcia, contained no provision limiting Herd's liability. Herd's charges to the carrier would have been the same whether the agreement between the plaintiff shippers and the carrier had expressly limited to $500 the liability of the carrier for each item handled or had provided that the carrier might be liable up to many thousands of dollars for some or all of the items. Herd can limit its liability to plaintiffs in this case only by showing that either (A) the contract between plaintiffs and the carrier, or (B) the statute, Cogsa, limits to $500 the liability of the carrier and the ship for the loss sustained by plaintiffs, and that Herd is entitled to the benefit of that contract or statute.

A. Whether the contract between the plaintiff shippers and the carrier limits to $500 the liability of the stevedore

for the damage to the press requires an answer to three subsidiary questions: (1) Was there a contract between the plaintiffs and the carrier governing their respective rights and obligations with respect to the crated press at the time it was damaged? (2) Did such contract limit to $500 the liability of the carrier for damage to the press at the time the damage occurred? (3) Is the stevedore entitled to the benefit of such limitation of liability?

B. Whether Cogsa *ex proprio vigore* limits to $500 the liability of the stevedoer, also depends upon the answer to three questions: (1) Does Cogsa apply unless a bill of lading covering the specific items of cargo has been issued? (2) Did the damage occur during the period "from the time the goods are loaded on to the time when they are discharged from the ship"? (3) Does Cogsa extend to a stevedore the benefit of the limitation of liability contained in sec. 1304(5), or does Cogsa govern only the respective rights and obligations of the carrier and the ship on the one hand, and the shipper on the other?

COGSA, GENERALLY, AND THE SITUATIONS IN WHICH IT IS OR MAY BE MADE APPLICABLE.

46 U.S.C.A. 1312 provides that Cogsa "shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade: * * *" But sec. 1301 (e), defining the term "carriage of goods" states: "The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship."

The effect of this definition is that Cogsa does not apply *ex proprio vigore* to the entire period of the ordinary contract of carriage, which usually commences when the cargo is accepted by the carrier for transportation or comes within the control and custody of the officers of the ship for that purpose. *Pollard v. Vinton*, 105 U.S. 7, 9; *Inland Waterways Corp v. Standard Commercial T. Co.*, (5 Cir.) 65 F. 2d 715, 717; *The Yoro, Mackey v. U.S.*, (S.D.N.Y.) 83 F. Supp. 14, 18, aff'd. 197 F. 2d 241, 243.

Although Cogsa does not apply *ex proprio vigore* to the period before the goods are loaded on, it is frequently made applicable by contract throughout the entire time the goods are in the custody of the carrier. See e.g. *The Yoro, Mackey v. U.S.*, 83 F. Supp. at 19. But there was no such provision in the contract in the instant case.

Knauth, Ocean Bills of Lading, p. 141, says that under the Hague Rules, upon which Cogsa is based, five steps must be considered in the case of a shipment such as the one involved here. "A. From the inland point to the custody of the ship's agent, who can only give a 'received for shipment' (or custody or port) bill of lading; B. the custody of the ship's agent prior to 'loading on' or hooking on the ship's tackles; C. the 'Cogsa' period on board the ship, from tackle hooked on at loading port to tackle released at discharging port with a 'shipped' (on board) bill of lading; D. the port agent's custody period at port of discharge; and E. the on-carriage thereafter."

The distinction between period B, the "before" period, and period C, the "Cogsa" period, is illustrated by the fact that 46 U.S.C.A. sec. 1303 provides for two types of bills of lading. Sec. 1303(3) provides: "'After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—* * *'". This is a "received for shipment", "custody", or "port" bill of lading. Sec. 1303(7) provides for a "shipped" bill of lading, as follows: "After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading * * *."

During period C, the Cogsa period, "from the time when the goods are loaded on to the time when they are discharged from the ship," the rights and immunities of the carrier and the ship are governed by sec. 1304(5), which provides a limitation of $500 per package unless a higher value has been declared by the shipper before shipment and inserted in the bill of lading.

During period B, which has been called "the non-possessive custody period", Cogsa does not apply, unless it is made applicable by the contract. Sec. 1307. *Federal Insurance Co. v. American Export Line,* (S.D.N.Y.) 113 F. Supp. 540.

1. A. *Was there a contract between the plaintiff shippers and the carrier governing their respective rights and obligations with respect to the crated press at the time it was damaged?* The findings of fact show that the shippers and the carrier intended that bills of lading should be issued covering each of the 62 crates or cases. Such bills of lading were prepared by the shippers' agent on the carrier's forms, and were signed by the carrier's agent. They were "shipped" bills of lading. Sec. 1303(7). Since the bills of lading in the instant case were "shipped" bills, and since the crated press was never loaded onto the ship, it was proper to eliminate that item from the bill of lading on which it was listed, before that bill was delivered by the ship's agent to the shippers' agent. It is not the custom in the Port of Baltimore to issue dock receipts or "received for shipment" bills of lading, although the latter are sometimes issued here, and may be demanded by the shipper after the carrier has received the goods into his charge. Sec. 1303(3).

The plaintiffs and the carrier had agreed upon the terms of their contract before the crated press was dropped; those terms were embodied in the bills of lading which had been prepared, and included clause 7, clause 30 and clause 37, set out in the findings of fact. Clause 37 provided that the bill should have effect subject to Cogsa; clause 7 was a "before and after clause" covering the rights and obligations of the carrier during Periods B and D, before and after the Cogsa period.

The parties, therefore, were governed by the terms of their agreement as set out in the bills of lading, with respect to all of the crates, from the time the crates were delivered into the charge or custody of the carrier. "Mutual manifestations of assent that are in themselves sufficient

to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; * * *." *Restatement of the Law, Contracts*, sec. 26. See also *The Sabine Sun*, (S.D.N.Y.) 48 F. 2d 598, aff'd (2 Cir.) 55 F. 2d 63, 287 U.S. 291; *The Yoro, Mackey, et al. v. U.S.*, (S.D.N.Y.) 83 F. Supp. 14, aff'd (2 Cir.) 197 F. 2d 241; *Inland Waterways Corp. v. Standard Commercial T. Co.*, (5 Cir.) 65 F. 2d 715, at 717.

1. B. *Is Cogsa ever applicable ex proprio vigore unless a bill of lading is actually issued covering the specific items of cargo?* No American case has been cited or found passing on this question; it appears either from the opinion or the findings of fact in all of the cases that a bill of lading had in fact been issued.

In *The Yoro*, supra, bills of lading were issued bearing "exceptions", in which were noted the loss of certain bags of coffee and the damage to certain other bags before they were loaded onto the ship. It was held in that case that Cogsa did not apply *ex proprio vigore* because the cargo had not reached the ship's tackle, not because the items in controversy had been eliminated from the bills of lading as issued. The "before and after" clause was held to apply to the bags which had been lost or damaged. The decision turned on the question whether the bags had come into the custody of the carrier at the time of the loss and damage. The *Inland Waterways* case, *supra*, also involved the question of custody.

Cogsa may be applicable *ex proprio vigore* even though no bill of lading has ever been actually issued. *U.S. v. The South Star, et al.*, (2 Cir.) 210 F. 2d 44, 45. Sec. 1303(3) provides that "after receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading". Sec. 1303(7) provides: "after the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading". If Cogsa

does not apply unless a bill of lading has already been issued, those provisions would be meaningless. *Carver, Carriage of Goods by Sea*, 9th Ed., p. 169.

Sec. 1306 permits special agreements in regard to particular goods, not ordinary commercial shipments made in the ordinary course of trade. See also certain British cases discussed in *Carver*, op. cit. p. 169, 170. But the instant case is not such a case. The shippers and the carrier did not make any such contract. The bills of lading which were prepared specifically provided that they should have effect subject to Cogsa.

2 A. *Does the contract between the plaintiffs and the carrier limit to $500 the liability of the carrier for damage to the press at the time the damage occurred?* B. *Does Cogsa, sec. 1304(5) apply to limit such liability to $500?*

The contract, as set out in the bill of lading, provides in clause 37 that it shall have effect subject to Cogsa. So, during the Cogsa period, "from the time when the goods are loaded on to the time when they are discharged from the ship", sec. 1304(5) applies to limit the liability of the carrier to $500, since no greater value was declared.

Before the Cogsa period, clauses 7 and 30 control. Clause 7 provides: "The carrier's responsibility in respect of the goods as a carrier shall not attach until the goods are actually loaded for transportation upon the vessel. * * * Any responsibility of the carrier in respect of the goods attaching prior to such loading or continuing after leaving the vessel's tackles as aforesaid, * * * shall be the same only as that of a warehouse * * *; and all conditions, exemptions, exceptions and limitation of the liability of the carrier contained in this contract shall be deemed to apply also to such warehouseman's liability as well as to liability as a carrier." Clause 30 limits to $500 the liability of the carrier for each item.

Under these circumstances, if the suit were against the carrier, it would make no difference whether the contract or Cogsa controls. The only reason for deciding whether the damage occurred during the period controlled by

Cogsa is that some judges have felt that in passing on the claim of the stevedore to be entitled to the benefit of the carrier's limitation of liability, it might make a difference whether that limitation is based on Cogsa itself, or on the contract of carriage. *A. M. Collins & Co. v. Panama R. Co.*, (5 Cir.) 197 F. 2d 893, 895.

Knauth, op. cit., p. 144, states: "The Convention and Act define the terms 'Carriage of Goods' in Art. 1 (e) as 'the period from the time when the goods are loaded on to the time when they are discharged from the ship.' The coverage therefore depends on physical acts at the ship's side or on her decks which can be seen and which are usually the occasion for a record, a tally and an inspection." *Knauth* then lists all the possible meanings which have been suggested: the time of receipt for shipment, the time when the cargo comes alongside, the moment when the loading tackle is hooked on to lift the item of cargo from pier or lighter for transfer to the ship (the "tackle to tackle" rule), the moment when the item of cargo, either suspended from tackle, or rolled on a conveyor or sliding through a pipe, actually crosses the line of the ship's rail (the "rail to rail" test), the moment when the item of cargo first comes to rest within the boundaries of the hull of the ship, on deck or in a hold, and the moment when the item of cargo finally comes to rest in the place of stowage. *Knauth* concludes that "loading on" should be related to some physical act of possession associated with transfer of risk from a shore interest to a ship interest, and states that the following points satisfy the requirements of the various usual situations:

> "When cargo is hoisted by ship's gear and tackle, the loading on occurs when the ship's tackle is hooked onto the draft of cargo. When cargo is hoisted by a pier-side crane, or a floating derrick not controlled by the ship, the loading on occurs when the draft of cargo is first laid down at a point within the boundaries of the hull of the ship. When the cargo is rolled from the shore or lighter into the ship by a gangway, over the ship's rail or through a side door, the loading on

occurs when the cargo passes over the ship's rail or through the ship's side door. When the cargo flows through a chute or a pipe, the loading occurs at the ship's end of the chute or pipe; in handling liquids, this would be at the flange where the ship's piping or hose is connected to the shore or lighter pipe or hose." (p. 144)

Most American cases have adopted the "tackle to tackle" test. *The Yoro, Mackey, et al. v. U. S., supra; Federal Insurance Co. v. American Export Lines, supra; Remington Rand v. American Export Lines,* (S.D., N.Y.) 132 F. Supp. 129. The reasons for preferring this rule are discussed by *Knauth,* op. cit., p. 146.

The application of the "tackle to tackle" test in the case at bar is not free from doubt. The damage did not occur while the goods were being lifted onto the ship, but during a preliminary stage of the loading operation prior to the actual lift. The goods had not been placed in a sling attached to the ship's tackle or to the tackle of the floating derrick, to be lifted onto the ship. The lift which caused the damage was a preliminary lift to enable the longshoremen to place a sling under the case. If Bethlehem had been in charge of the operation, that lift would probably have been made by a jack.

Moreover, the tackle was not the ship's tackle but the tackle of the floating derrick. *Knauth,* op. cit., p. 145, quoted above, makes a distinction between (a) where the cargo is hoisted by the ship's tackle and (b) where it is hoisted by a pier-side crane or a floating derrick not controlled by the ship. In the latter case, he says that "the loading on occurs when the draft of cargo is first laid down at a point within the boundaries of the hull of the ship". See also *The Cordillera,* (C.C., S.D., N.Y.) 5 Blatch. 518.

It is necessary to draw the line somewhere. "The Hague Rules and the resulting Convention and legislation are shaped with respect to the ship rather than the carrier." *Knauth,* op. cit. p. 146. I conclude that the damage did not occur during the Cogsa period.

III. *Is the stevedore entitled to the benefit of the carrier's $500 limitation of liability either (A) under the contract, or (B) under Cogsa?* The answers to (A) and (B) are not necessarily the same, and the conflicting authorities on both aspects of the question have to be carefully considered, because in many cases the provisions of the bill of lading make Cogsa applicable as a matter of contract to contracts of carriage to which it would not apply *ex proprio vigore*.

After the passage of the Harter Act, 27 Stat. 445, 46 U. S. C. A. 190-196, and before the passage of Cogsa, the Supreme Court decided *Reid v. Fargo, as Pres. Am. Exp. Co.*, 241 U. S. 544. In that case the bill of lading limited the liability of the carrier to $100. A valuable automobile was lost due to the negligence of the stevedore. The court held the stevedore primarily liable for the full amount, and the carrier secondarily liable for $100 only. The stevedore did not plead, nor attempt to rely upon, the limitation of liability of the carrier, but the Supreme Court gave no indication that the stevedore might have such a right, either under the Harter Act or under the general law.

Although the Harter Act was very broadly worded, it was held generally to govern only the relations between the carrier and the ship on the one hand and the cargo owner on the other. *Poor, Charter Parties and Ocean Bills of Lading*, (3d Ed.) p. 129; *Robinson on Admiralty*, (1939 Ed.), p. 506; *Green, The Harter Act*, 16 Harv. L. Rev. 157, at 177. The Harter Act formed the basis for many of the Hague Rules adopted by the Brussels Convention. When the Rules were enacted by Congress as Cogsa, it was recognized that the Act was a compromise between the desires of shippers and carriers with respect to their reciprocal rights and obligations. I have been referred to nothing in the Rules, the Convention or the debates in Congress at the time Cogsa was adopted which indicates that the rights or obligations of stevedores were considered in any way.

Nevertheless, in *A. M. Collins & Co. v. Panama R. Co.*, (5 Cir.) 197 F. 2d 893, *cert. den.* 344 U.S. 875, the majority of the court, per Rives, Circuit Judge, held that a stevedore was entitled to the $500 limitation of liability. There was a

strong dissent by Circuit Judge Holmes. In the *Collins* case, the shipment was from a port in the United States to the Canal Zone, and the bill of lading contained an express limitation of liability to $500 per package or per customary freight unit. The majority stated that a possible difference might be claimed between an application of Cogsa *ex proprio vigore* and its application by reason of the agreement contained in the bill of lading, in that in the latter alternative the limitation of liability may not be effective as to the stevedore unless its services were engaged either expressly or impliedly subject to the same limitation of liability. The court found that the stevedore in that case was acting under the limitation of liability provision of the bill of lading, and stated that if the carrier had contracted with the stevedoring company for a limitation of liability in a larger sum or for liability without limitation, a different situation would have been presented.

There was no evidence in the *Collins* case similar to the evidence in the case at bar that stevedores on the Eastern Seaboard customarily base their charges upon such factors as weight, difficulty of handling, etc., and do not consider the amount of their possible liability in fixing their rates.

There is no evidence in the case at bar that any of the parties intended that the stevedore or the owner of the floating derrick should have the benefit of the limitation of liability provision included in the bill of lading issued by the carrier to the plaintiffs. Clause 1 of the bill of lading reads as follows: "DEFINITIONS. The term 'Carrier' used herein includes owners, vessels, masters and charterers thereof, and any substituted or continuing Carrier. The term 'Goods' and or 'Packages' includes all property mentioned or referred to on the face of this bill of lading." The bill of lading refers throughout to the "carrier"; and contains nothing to indicate that the stevedore was entitled to any limitation of liability to which the carrier was entitled. If the stevedore is to have the benefit of such limitation, it must be because of Cogsa or of some general rule of law.

The majority in the *Collins* case said that the limitation of liability of the carrier under the Carriage of Goods by

Sea Act is not intended to be personal, but, unless otherwise agreed, extends to any agency by means of which the carrier performs its contract of transportation and delivery. The court cited 2 American Law Institute, *Restatement of Agency*, sec. 347: "An agent who is acting in pursuance of his authority has such immunities of the principal as are not personal to the principal." This section of the *Restatement* refers to immunities of the principal and not to limitation of liability. The comment following sec. 347 indicates that it is intended to apply to immunities which exist in order more adequately to protect the interests of a person in relation to his property; thus, the servant of a landowner while acting within the scope of his employment is under no greater duties to unseen trespassers than is the landowner. A contractor who cuts timber on an electric company's easement is not liable in trespass to the landowners. *Ivy H. Smith Co. v. Warfiemius*, 201 Md. 367. The Maryland case discusses at length sec. 343 and sec. 345 of the *Restatement*, as well as sec. 347. *Herzog v. Mittleman*, 155 Ore. 624, the only case cited by the majority in the *Collins* case on this point, is to the same effect. Although an occasional case has given the section a broader application, it should not control the problem involved in the *Collins* case and in the case at bar. The question here is whether (A) the shippers and the carrier in making their contract, or (B) Congress in passing Cogsa, intended the limitation of liability to be personal to the carrier and the ship or intended to extend the benefit of the limitation of liability to the stevedore. The evidence with respect to (A) was discussed in the last paragraph. In considering (B) it is important to note that the reciprocal obligations which Cogsa imposes are personal to the ship and to the carrier and do not extend to the stevedore.

The majority in the *Collins* case stated: "It would be unreasonable to assume that Congress intended that, in order to make the limitation of liability provided in the Carriage of Goods by Sea Act applicable to the unloading of goods, the carrier must do its own stevedoring." This is true; but the majority overlooked the fact that the carrier and the ship are entitled to the $500 limitation of liability whether

they do their own stevedoring or have it done by an independent contractor, and that it is not necessary to extend the benefit of the limitation to the independent contractor in order to give the carrier and the ship the protection to which they are entitled under the statute. In passing Cogsa Congress was thinking of the liability of the carrier and of the ship to the shipper, not the liability of the stevedore.

Judge Holmes, dissenting in the *Collins* case, said:

"The right of the ship or carrier to limit its liability for negligence to an amount not exceeding $500 is in derogation of the common law and must be strictly construed. It does not shield an employee, not a party to the bill of lading, who (for instance) negligently sets fire to or otherwise negligently injures the cargo. No ship, carrier, or party to the bill of lading, is being sued in this case, but only the corporate stevedore, which is primarily liable under the decision of *Reid v. Fargo*, 241 U.S. 544, 36 S. Ct. 712, 60 L. Ed. 1156. * * *.

"* * * The appellee owed a duty to the public to keep its stevedoring equipment in a safe condition; the answer admits that it did not do so. Where an agent violates a duty that he owes to a third party, he is personally liable to the latter, not by reason of his agency, but upon the ground that he has failed in his common law obligation not to injure another. * * *

" 'The liability of an agent for his own negligence has been embedded in the law.' Brady v. Roosevelt S.S. Co., 317 U.S. 575, 580, 63 S. Ct. 425, 428, 87 L. Ed. 471. * * *

"The bill of lading in this case limited the carrier's liability in question to $500, but it did not confer upon the carrier the power to diffuse partial dispensations to its negligent stevedores or other agents for their wrongful acts."

In the *Steel Inventor*, (D.Md.) 35 F. Supp. 986, Judge Chesnut called attention to the difference between an action against the carrier in which the carrier brings in a lighterage company for indemnity, and a tort action against

the lighterage company. Judge Chesnut said: "The libelants base their claim against the Isthmian Steamship Company on breach of contract, and it will of course have been noted that they are not directly suing the Baltimore Company in tort for negligence. If the suit had been in the last mentioned form it would seem clear enough that the larger sum would be the proper measure of damages. * * *" 35 F. Supp. at 996, 997.

Despite my respect for the majority judges in the *Collins* case, the other courts which have approved their opinion, usually without discussion, I believe that Judge Holmes adopted the sounder position.

The *Collins* case was cited with approval in *U. S. v. The South Star, et al.*, (2 Cir.) 210 F. 2d 44, affirming 115 F. Supp. 102, where one of the questions was whether a stevedore is entitled to the benefit of the one year limitation in Cogsa; in *Ford Motor Co. v. Jarka Corp.*, 1954 A.M.C. 1095 (Municipal Court, New York City), which was similar to the case at bar, and will be discussed below; and in *Autobuses Modernos, S. A. v. Federal Mariner, etc.*, (E.D.Pa.) 1954 A.M.C. 1650, 125 F. Supp. 780, where the question was whether the limitation of liability of the carrier and the ship extended to the owner and the charterer of the ship.

The extent of the liability of an owner or charterer is quite different from the question involved in the case at bar, as was clearly pointed out in the majority opinions of the Supreme Court of Australia in the recent case of *Wilson v. Darling Island Stevedoring and Lighterage Co., Ltd.* (1956), Argus Law Reports 311, 29 Australia Law Journal 740. See also *Elder, Dempster & Co., Ltd. v. Paterson Zochonis & Co., Ltd.*, 1924 A.C. 522. The latter is a most difficult case, because the several law lords gave different reasons for their conclusions. I concur in the construction of the *Elder, Dempster* case set out in the opinions of Fullager, J., and Kitto, J., in *Wilson v. Darling Island Stevedoring and Lighterage Co., Ltd., supra*. The limitation of liability granted to a ship would be of little value if it could be avoided by the simple expedient of suing her owner *in personam*.

In *Ford Motor Co. v. Jarka Corp., supra,* besides citing the *Collins* case, and refusing to give any weight to *Reid v. Fargo, as Pres. Am. Exp. Co.*, the judge of the Municipal Court cited with approval two cases decided in New South Wales, one by a nisi prius court, *Waters Trading Co., Ltd. v. Dalgety & Co., Ltd.* (1951), 2 Ll. Rep. 385, and one by the Supreme Court of New South Wales, *Gilbert Stokes* and *Kerr Prop. Ltd. v. Dalgety & Co., Ltd.* (1948), 81 Ll. L. Rep. 337. The two New South Wales cases, however, have now been overruled by the Supreme Court of Australia. *Wilson v. Darling Island Stevedoring and Lighterage Co., Ltd., supra.* The opinions in the latter case are quite long and discuss all of the relevant British cases. Fullager, J., in an opinion with which Dixon, C.J. agreed, said:

> "* * * What has been supposed to be a principle involved in the *Elder Dempster* case (although there is a conspicuous lack of unanimity as to what that principle really is) has, as will be seen, been extended so as to give to a stevedore exemption from liability for negligence by virtue of a provision in a bill of lading to which the stevedore is not a party, and which is really no concern whatever of the stevedore. This appears to me to be a 'development' of the common law which is altogether out of character, and which is exactly the opposite of what one would have expected and felt to be justified. It is all the more remarkable in view of the fact that the modern tendency has been to expand the field of lability in tort. The common law has, I think, from quite early times — consistently with its general policy of freedom of contract — allowed the validity of provisions in a contract which limit or exclude liability for negligence. But it has always frowned upon such provisions and insisted on construing them strictly. * * *"

In disposing of the opinion of Owen, J., in the *Gilbert Stokes* case, Judge Fullager said:

> "The second comment is that his Honour, at the beginning of his judgment speaks as if the cargo-owner was doing something slightly disreputable in attempt-

ing 'to avoid the exceptions and limitations contained in the bill of lading' by bringing an action of tort against the persons who, by their negligent acts, had damaged his goods. I am, as I have indicated above, unable to understand this approach, which seems to me to be wrong and alien to the whole spirit of the common law. A sounder approach would be made in such a case as the *Gilbert Stokes Case* by asking why a self-confessed tortfeasor should be allowed to shelter behind a document which is not, and never was, any concern of his."

The concurring opinion of Judge Kitto in *Wilson v. Darling Island etc. Ltd.* said:

"* * * It is true that, having regard both to the nature of the services contracted for and to the corporate character of the carrier, the inference is inescapable that both parties contemplated that the carrier would perform its obligation through servants or other persons engaged for the purpose and that the operations involved in the process described in the case stated as sorting, stacking and storing of the cargo after discharge at the port of destination was an operation naturally to be performed through the agency of stevedores. A necessity for the carrier to depend upon others to perform his obligations under the contract suggests a strong reason why he should have desired to stipulate for immunity for himself from liability for loss or damage in the course of the performance of those obligations. But there is no such readily discernible reason why he should concern himself to make, or should be understood as making, a similar stipulation for the benefit of those whom he should engage as servants, stevedores and the like and still less is there any ground for understanding the consignor as conceding immunity to such persons. The train of thought of which the exemption clause is a natural expression is that, since the carrier has no alternative but to rely upon others to do the work involved in producing the result contracted for, it is mutually agreeable that he should not have to bear

responsibility for any failure of theirs to observe proper standards in the work they do, but that the consignor shall look to them alone to make good any loss or damage which their defaults may cause."

Judge Kitto cited with approval the dissenting opinion of Judge Holmes in *Collins v. Panama R. Co., supra.*

I conclude that neither (A) the contract between the shipper and the carrier, nor (B) Cogsa, extends to the stevedore in this case the $500 limitation of liability.

(Tr. pp. 675-683):

OPINION OF COURT

(Filed September 26, 1957)

Thomsen, Chief Judge

The former opinion in this case, 145 F. Supp. 554, stated my reasons for concluding: (1) that negligence on the part of the stevedore, Robert C. Herd & Company, Inc., was responsible for dropping into Baltimore harbor a crate containing a heavy press and other items, and (2) that the stevedore was not entitled to the $500 limitation of liability which the Carriage of Goods by Sea Act provides for a ship and its owners. The questions now before the court are: (a) the amount of damages recoverable, and (b) the party or parties entitled to recover those damages.

FINDINGS OF FACT

W. H. Kraus owns or controls all of the stock and is the president of (1) Krawill Machinery Corp., of Michigan (Krawill), which trades in second-hand machinery, (2) Engineering Industries, Inc., of Michigan (E. I. Inc.), which manufactures tools and dies and (3) Engineering Industries International, S.A., a Tangier corporation (E. I. Int'l), which undertakes contracts to build plants in Spain and elsewhere, furnishes the engineering services, and subcontracts the other work. Kraus also owns 60% of the stock and is president of Kraus Manufacturing Co., of

Michigan (Kraus Mfg.), which, until the spring of 1954, was engaged in manufacturing tools, die parts, and the like.

In 1953, Comercio, Industria y Transportes, S.A., of Spain (Cointra), had a contract with the United States Army to manufacture and supply in Spain a considerable quantity of land mines. Through Low Shaw & Co., Inc., of Paris (Low Shaw), Cointra entered into a contract with E. I. Int'l to supply and install at Cointra's plant at Pusol, near Valencia, Spain, the machinery necessary to produce such land mines. In the final letter, which was accepted by Low Shaw on behalf of Cointra, E. I. Int'l stated:

> "We herewith submit our quotation for dies, tools and gages as outlined on attached 21 sheets on your M62A Land Mine contract.
>
> "Our price includes design, build and tryout on our facilities, dies to be production type to meet suitable press requirements.
>
> "* * * [High quality of presses, dies, etc. specified] * * *
>
> "You are to furnish at our facilities qualified personnel whom we will thoroughly acquaint with this programme. This personnel shall be responsible for running production and inspection of this job.
>
> "Sample parts to be approved by our personnel prior to shipment. We will supply sample parts to you for inspection at your plant.
>
> "Technical assistance in Europe until date included in price. We also agree to supply one engineer for two weeks from date at our cost. Also we will supply one qualified technician for two weeks to act in an advisory capacity in setting up production of these tools in your plant.
>
> * * *
>
> "Delivery will be made piecemeal in single or families of tools on a given part."

With Kraus acting on behalf of all parties, E. I. Int'l contracted (a) with Krawill to supply four presses, including the 100-ton Clearing press involved in this action, (b) with Kraus Mfg. to produce the necessary die parts, attachments, etc., and (c) with E. I. Inc. to prove the dies and to make the pilot runs necessary to produce the sample parts for 100 mines called for by the contract with Cointra. Seven other presses were purchased in Europe.

After the four presses had been obtained by Krawill and the dies and attachments had been manufactured, the tests were made and the sample parts were produced in Michigan. Thereafter, all of the machinery, attachments, die parts, and sample parts were crated and packed into cases at E. I. Inc.'s plants in Detroit, and were turned over to agents for shipment by rail and water to Spain. In the crate with the 100-ton Clearing press were packed certain die parts, some of the sample parts for the land mines, and a spare crankshaft for one of the other presses. The proof of what die parts and sample parts were packed in that crate is not satisfactory, but when depositions were taken in Michigan, Herd's counsel accepted without objection five shipping invoices (Pl. Ex. 9) to show, in his own words, "that the other items on pages 2, 3, 4 and 5 were packed with the 100-ton press". In view of that statement by Herd's counsel, plaintiffs' counsel may be excused for not offering further proof of those items. There is other substantial additional evidence of many of the items.

Immediately after the case dropped into the waters of Baltimore harbor on the afternoon of April 14, 1954, Kraus was notified, and he arrived in Baltimore that evening. The press had been lifted out of the water, and some of the other contents of the case were recovered during the next day or two. Many of the attachments on the press had been torn off; all of its parts, including the gears in the gear case, had been exposed to brackish water for at least four hours; the visible unpainted parts already showed some corrosion; and there was evidence of damage to the nut around one of four massive bolts, which indicated an impact sufficient to disturb the delicate adjustment of the

internal mechanism of the press. Many of the die parts and sample parts which were recovered showed corrosion or damage or both. Herd made some effort to prevent further corrosion by having the press and the other material cleaned and treated, but the effort was only partially successful.

The press and the other material recovered from the river were shipped back to the E. I. Int'l plant in Detroit by rail. At whose instance this was done was not proved; the bill was paid by the insurance company which had issued an inland marine policy on the press.

Kraus flew to Spain promptly, explained the situation to Cointra, and showed them some photographs, which were offered in evidence. Cointra refused to accept the press because of the nature of the damage it had sustained. Kraus attempted to find a replacement in Europe, without success, and Cointra did not find a replacement for several months.

In the meantime, Kraus secured an estimate for repairing the obvious damage to the press. The estimated cost was $10,000 plus $200 cartage, with no guarantee that the press would operate satisfactorily after the repairs were made. The value of similar presses in the second-hand machinery market was around $10,000. All witnesses on the subject testified that it would have been an unwise economic decision to attempt to repair the press, and that it had only a salvage value. The highest salvage value given was $500 net. I accept this evidence.

Under the contract with Cointra, E. I. Int'l would have received $20,433, c.i.f. Valencia, for the press, including the new attachments which had been added. The $20,433 was equivalent to $18,790 at Baltimore, including packing and freight from Detroit.

It was necessary for plaintiffs to replace the lost or damaged die parts and sample parts as soon as possible to avoid claims for delay by Cointra. Kraus Mfg. was already out of business, so Kraus arranged to have the die parts made by E. I. Inc. Since all of the other presses and die parts were already in Spain, it was necessary to prove and test the new die parts there. The work in Spain included: (1) try-out of the replacement die parts and at-

tachments, (2) reassignment of 80-90% of the dies among the remaining ten presses then in Spain, to make up for the lost eleventh press, and (3) a new pilot run. To accomplish this work it was necessary to send engineers from Detroit to Spain, since there were no available engineers in Spain with the requisite know-how. While Spanish operators could and did operate the presses after receiving instructions, it was necessary to have experienced engineers to supervise the pilot run.

Sending engineers to Spain required payment of their air travel expenses, their living expenses, and their salaries. The travel expenses included excess baggage charges for carrying the new die parts. Three of the engineers travelled air coach and one first class. Two of the three received in cash the difference between air coach and first class fares. Under these circumstances plaintiffs should not recover more than air coach fares. Salaries should be allowed at the rate actually paid each man, not the so-called "value" contained in the amended bill of particulars. Properly calculated, the engineering expense amounted to $14,291.22.

Under the Cointra contract, E. I. Int'l was required to furnish one engineer at Pusol for two weeks. Plaintiffs have therefore eliminated the travel expense incurred by Kraus on his second trip to Spain, and fourteen days of his time; they claim at $150 per day for all of his time over fourteen days. Kraus was a competent engineer, but he was paid no salary by any of plaintiff corporations for these services, and no salary at all by most of them. No salary for Kraus should be allowed, but his expenses on his trip to Baltimore and on his first trip to Spain are proper items of damages. They amount to $64.28 and $1,072.81 respectively.

The cost of manufacturing the replacements for the die parts which were damaged or lost is difficult to determine. No cost records were kept by E. I. Inc. Its vice-president estimated the cost to E. I. Inc. of replacing those parts, including labor, material, overhead and profit, at $19,100. Kraus Mfg. and E. I. Inc. entered into a contract under

which Kraus Mfg. agreed to pay that amount to E. I. Inc. if, but only if, Kraus Mfg. is reimbursed for the loss of and damage to the parts and dies by the party or parties responsible for the loss and damage. In view (a) of a false statement of the value of the 100-ton press given by or on behalf of Kraus to the insurance company which issued the inland marine policy, and (b) of padded claims made by Kraus and his companies, I cannot accept $19,100, or even $19,100 less a profit of 10 or 15%, as the fair cost of such repairs. Undoubtedly they cost a substantial amount; but for the reasons stated, and because of the generally unsatisfactory character of the testimony and other evidence offered by plaintiffs on this issue, I find the reasonable cost of manufacturing the replacements for the lost dies and die parts to have been $12,000.

The lost crankshaft was worth $1,275.

Overseas telephone calls and cables made necessary by the accident amounted to $998.03.

Counsel for Herd agreed at the trial that it would not be necessary for plaintiffs to show which items of damage were properly collectible by the several plaintiffs, but that Krawill, individually, and as assignee of the other plaintiffs, may recover any damages which might properly be recovered from Herd by any of the plaintiffs, including the reasonable cost to E. I. Inc. of manufacturing the replacement dies and parts. In this way Herd avoided the possibility of being held for the full price Kraus Mfg. had agreed to pay E. I. Inc. The result of this agreement relieves counsel and the court of much time and effort, and is fair to all parties.

DISCUSSION

The Restatement of the Law, Torts, sec. 927 states:

> "Where a person is entitled to a judgment for the conversion of a chattel or the destruction of any legally protected interest in land or other thing, the damages include

"(a) the exchange value of the subject matter or the plaintiff's interest therein at the time and place of the conversion or destruction, or a different value where that is necessary to give just compensation, and

"(b) the amount of any further loss suffered as the result of the deprivation, and

"(c) interest from the time at which the value is fixed or compensation for the loss of use."

Counsel for Herd contend that Krawill is not entitled to the profit it would have received upon delivery of the press to Cointra, pursuant to the contract, but that the award should be limited to the cost of the press to Krawill or the value of similar presses in the United States. The applicable law, however, clearly recognizes the right of a plaintiff to recover the contract price. Illustration 1 to sec. 917 of the Restatement is as follows:

"1. A negligently damages B's goods which B is on the way to deliver to C who has agreed to pay for them a price far above their market value. B is unable to obtain other goods to satisfy his contract with C. A is liable to B for the profit which he would have made."

The die parts and sample parts lost or damaged in the accident had no market value, and no separate prices were fixed for them in the contract with Cointra. The fair measure of damages, therefore, is the reasonable cost to plaintiffs of replacing those parts, including: the initial cost of remanufacturing the die parts in Detroit, the reassignment of the dies among the presses then available in Puzel, the try-out there of the replacement parts and attachments, and the making of a new pilot run. Counsel for Herd contend that some of those items are expenses for which it should not be liable, but they cite no authorities in support of their contention. On the contrary, the

great weight of modern authority holds that a plaintiff may be granted recovery in a tort action for all damages which result from an accident, even though the exact injuries constituting such damages could not have been foreseen by the negligent defendant. The Restatement of Torts, sec. 435 (1948 Supp.), reads:

> "Sec. 435. *Foreseeability of Harm or Manner of Its Occurrence.*
>
> "(1) If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurrred does not prevent him from being liable.
>
> "(2) The actor's conduct is not a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm."

The consequences in this case should not be considered highly extraordinary within the meaning of that rule. There was no intervening cause and no result that was not among the hazards with respect to which the conduct was negligent. This is not a case like *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, where the injury to the plaintiff was caused by an instrument some distance away from the package which was being handled by the railroad's employee. There is no such problem of geographical remoteness in this case. Plaintiffs' claims are based upon the loss of and damage to the contents of the very crate the longshoremen were handling. The longshoremen should have foreseen that, if they handled the crate negligently, they might cause loss or damage to any person who had an interest in its contents. Comment b to sec. 917 of the Restatement of Torts states: "* * * although a contracting party who breaks his contract in failing to supply a machine would not be liable for the damages occasioned by the shutting down of a plant in which the

machine was a necessary unit unless at the time of making the contract he knew or should have known the facts (see Restatement of Contracts, Sec. 330, Illustration 1), one who negligently destroys such a machine may be responsible for the ensuing loss although he had no reason to know in advance of the machine's importance."

Conclusion

Krawill, individually and as assignee of the other plaintiffs, is entitled to recover for the following items:

(1) Loss of spare crankshaft	$ 1,275.00
(2) Damage to 100-ton press, less salvage	18,290.00
(3) Remanufacturing die parts in Detroit	12,000.00
(4) Engineering work in Spain: try-out, reassignment and pilot run	14,291.92
(5) Expenses of Kraus to Baltimore and on first trip to Spain	1,137.09
(6) Telephone and cable expense	998.03

In view of plaintiffs' padding of their claims, interest will not be allowed before the date of judgment.

The Clerk is instructed to enter judgment in favor of Krawill Machinery Corporation against Robert C. Herd & Company, Inc., for $47,992.04.

(R. p. 3)

JUDGMENT APPEALED FROM

September 26, 1957—Judgment in favor of Krawill Machinery Corporation against Robert C. Herd & Co., Inc., for the sum of $47,992.04.

[fol. 49]

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7620.

ROBERT C. HERD & COMPANY, INC., a Maryland Corporation, Appellant and Cross-Appellee,

versus

KRAWILL MACHINERY CORPORATION, KRAUS MANUFACTURING CORPORATION and ENGINEERING INDUSTRIES INTERNATIONAL, S.A., Appellees and Cross-Appellants.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

DOCKET ENTRIES

February 13, 1958, record on appeal filed and appeals docketed.

February 13, 1958, petition of appellant and cross-appellee for extension of time to file record filed.

ORDER EXTENDING TIME TO FILE RECORD—Filed February 13, 1958

Upon the foregoing Petition, it is this *14* day of January 1958, by the United States Court of Appeals for the Fourth Circuit,

Ordered that the time for filing the record on appeal in this cause be and it is hereby extended until and including February 15, 1958.

John J. Parker, Chief Judge, United States Court of Appeals for the Fourth Circuit.

February 13, 1958, original exhibits certified up.

February 13, 1958, appearance of George W. P. Whip and Robert E. Coughlan, Jr., entered for the appellant and cross-appellee.

[fol. 50] February 13, 1958, appearance of William A. Grimes entered for the appellees and cross-appellants.

March 7, 1958, brief for appellees and cross-appellants filed.

March 7, 1958, joint appendix filed.

March 27, 1958, Brief for appellant and cross-appellee filed.

ARGUMENT AND SUBMISSION

April 16, 1958, (April term, 1958) cause came on to be heard before Sobeloff, Chief Judge, and Soper and Haynsworth, Circuit Judges, and was argued by counsel and submitted.

[fol. 51] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7620.

ROBERT C. HERD & COMPANY, INC., a Maryland Corporation, Appellant and Cross-Appellee,

versus

KRAWILL MACHINERY CORPORATION, KRAUS MANUFACTURING CORPORATION and ENGINEERING INDUSTRIES INTERNATIONAL, S.A., Appellees and Cross-Appellants.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

(Argued April 16, 1958. Decided June 16, 1958)

Before Sobeloff, Chief Judge, and Soper and Haynsworth, Circuit Judges.

Robert E. Coughlan, Jr., and George W. P. Whip (Lord, Whip & Coughlan on brief) for Appellant and Cross-Appellee, and William A. Grimes (Ober, Williams, Grimes & Stinson; Fildew, DeGree, Fleming & Gilbride, and Leslie W. Fleming on brief) for Appellees and Cross-Appellants.

[fol. 52] OPINION—June 16, 1958

Sobeloff, Chief Judge:

A stevedoring company was held liable in a civil suit in the United States District Court for the District of Maryland in the sum of $47,992.04, the full amount of resulting damage when a crated press fell into the Baltimore Harbor. The defendant's appeal challenges the amount of the judgment awarded. It claims the benefit of the limitation provisions of the Carriage of Goods by Sea Act (popularly called "Cogsa"), 46 U.S.C.A. 1300-1315,[1] and parallel pro-

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[1] The limitation of liability in respect to cargo is found in 46 U.S.C.A. Sec. 1304 (5).

"Sec. 1304. *Rights and immunities of carrier and ship. Unseaworthiness*

* * * * *

"Amount of liability; valuation of cargo.

"(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

"By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: Provided, That such maximum shall not be less than the figure above named.

visions of the bill of lading,[2] which limit the liability of the [fol. 53] carrier to the sum of $500.00 per package or customary freight unit. The District Judge held that while the carrier's liability is so limited, the stevedore's is not. The plaintiff cross-appeals, complaining of the Court's refusal to allow interest.

The crate containing the press was one of sixty-two cases or crates of machinery and equipment which Krawill Machinery Corporation of Detroit had sold and agreed to deliver to a Spanish purchaser. The particular crate involved in this suit had been loaded on a flat car and brought by rail from Detroit to the dock in Baltimore alongside which

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In no event shall the carrier be liable for more than the amount of damage actually sustained.

"Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading."

[2] The bill of lading of the carrier contained, among others, the following provisions:

"30. In consideration of a choice of freight rates having been offered to the shipper by the Carrier, it is agreed that in case of loss of, or damage to * * * goods of an actual value exceeding $500 * * * per package or, in the case of goods not shipped in packages, per customary freight unit, the value of such goods, shall be deemed to be $500 per package or per said unit and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per said unit and pro rata in case of partial loss or damage, unless the nature of such goods and a value higher than $500 per package or per said unit shall have been declared in writing by the shipper upon delivery to the Carrier and noted on the face hereof and unless payment of the extra freight charge incident thereto shall have been made or promised * * *, in which case such declared value, or the actual value if less, shall be the basis for computing damages and any partial loss or damage shall be adjusted pro rata. * * *

"37. This bill of lading shall have effect subject to the Carriage of Goods by Sea Act of the U. S. A. and the Carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act. To the extent that any term of this bill of lading is repugnant to or inconsistent with anything in such Act, it shall be void."

the SS CASTILLO AMPUDIA was moored, and the press was to be loaded on the ship by Robert C. Herd and Co., Inc., the stevedore, and carried to Valencia, Spain. The case was eight feet wide, five feet long, and eleven feet high, and weighed nineteen tons. As this was, in the judgment of the defendant's manager, too heavy to be lifted by the ship's gear, he arranged for the Bethlehem Steel Company's floating derrick to assist in the loading. The derrick was moored alongside the ship's offshore side, and the derrick's boom was swung over and across the ship's deck so that [fol. 54] the hook and gear were suspended over the flat car. As it was found that the regular wire sling could not be slipped under the heavy crate, it was decided to work a thinner wire under the crate, attach it to the hook of the derrick, and then as the crane lifted the crate a very short distance, the regular sling could be inserted under it.

The work was under the sole direction of the stevedore's gang leader, who stood on the pier and gave signals to his man on the deck, who was to relay them to the operator of the derrick. The latter was not informed that the plan was to lift the crate preliminarily only a few inches. Due to a miscalculation of the stevedore's foreman as to the reaction time of the deckman and the derrick operator in the execution of their orders, there was a failure of coordination between the man who signalled from the pier, the man who stood on the deck, and the operator of the derrick. The preliminary lift given the crate was more than the few inches intended. The crate being topheavy, its center of gravity shifted and it fell into the water. The District Judge's finding that the stevedore's foreman was negligent, is well supported and, indeed, is not contested on appeal.

We turn to the pertinent statute. Section 4 (5) of Cogsa, codified as 46 U.S.C.A., Sec. 1304 (5), is the limitation of damage section. By its express provision, neither the *carrier nor the ship* is liable in an amount exceeding $500.00 per package. Stevedores and others who may become responsible for loss or damage in connection with the movement of goods are not mentioned in this section, and the rights and responsibilities, liabilities and limitations upon liability, with which the act deals are generally in terms of carrier and ship vis-a-vis shipper. Nothing in the language

or history of the legislation indicates a purpose to regulate the stevedore's liability.

[fol. 55] The Harter Act (46 U.S.C.A., Sec. 190 *et seq.*), which preceded Cogsa, likewise did not deal specifically with the liability of the stevedore, and was considered to apply to the relation between the cargo shipper or owner and the ship or its owner, and not to the stevedore's liability. POOR, CHARTER PARTIES AND OCEAN BILLS OF LADING (3d Ed., 1948); Sec. 306, p. 129; Green, "The Harter Act," 16 Harv. L. Rev. 157, 177.

In *Reid* v. *Am. Exp. Co.*, 241 U.S. 544 (1916), where a bill of lading covering the shipment of an automobile limited the carrier's liability to $100.00, this limitation was enforced as to the carrier. In the same case, however, the stevedore, by whose negligence the automobile was dropped into the harbor, was declared by the Supreme Court liable for the full amount. This was considered the settled law for many years.

Although the later-enacted (1936) Cogsa dealt with the reciprocal rights and obligations of shippers and carriers, there is nothing to intimate that in enacting it, Congress meant to change the announced rule as to the stevedore's independent unlimited liability.

More recently, however, a sharp difference of opinion has arisen on this point. In the Fifth Circuit, in *A. M. Collins & Co.* v. *Panama R. Co.*, 197 F.2d 893 (1952), cert. den. 344 U.S. 875, the majority, in an opniion (sic) by Judge Rives, accorded a stevedore operating in the Canal Zone the benefit of the $500.00 limitation. The Court's rationale was that the stevedore was the ship's agent and therefore entitled to any immunity to which the ship was entitled.

We note preliminarily that the case before us may be [fol. 56] different, for unlike *Collins*, we have here evidence that on the eastern seaboard, stevedores base their charges upon such factors as weight, difficulty of handling, etc., and do not, like the carrier, offer a choice of rates in which the declared value of the cargo and the amount of possible liability is considered in fixing the charge. There is, accordingly, less reason in the instant case to infer, as did the majority in *Collins*, that the limitation of liability in the bill

of lading related to or was relied on by the stevedore, or that the carrier and shipper intended to contract for its benefit. Herd and Company had no contract with the shipper, and its agreement with the shipper's agent included no limitation of liability.

However this may be, Judge Holmes' dissent in *Collins* reasons that a stevedore is subject to the ordinary liability for its negligence; that immunity (or limitation of liability) is the exception and not the rule; that the right of the carrier to limit its liability for negligence to an amount not exceeding $500.00, being in derogation of the common law, should be strictly construed, and may not be availed of by one who is not a party to the bill of lading. He thought *Reid* v. *Am. Exp. Co.*, supra, sufficient authority for his position, but also invoked the general principle that an agent who violates a duty to a third party is liable for failing in his common law obligation not to injure another. 3 C.J.S., "Agency," Sec. 221. "The liability of an agent for his own negligence has long been imbedded in the law." *Brady* v. *Roosevelt SS Co.*, 317 U.S. 575, 580 (1943). In declining to make an inference that a private operator of a government vessel, an agent of an immune government corporation, had likewise been immunized, the Supreme Court said "if Congress had intended to make such an inroad on the rights of claimants it would have said so in unambiguous terms." P. 581. [fol. 57] The bill-of lading, concluded Judge Holmes' dissent, limited the carrier's liability to $500.00, "but it did not confer upon the carrier the power to diffuse partial dispensations to its negligent stevedores or other agents for their wrongful acts." 197 F.2d 893, 898.

With the highest respect to the majority opinion in *Collins*, Judge Holmes' reasoning commends itself to us more. It is not unknown in the law for several liabilities to arise from a single injury and, unless commanded by law or agreed to by the parties, there is no requirement that the same measure of damages shall apply to all persons subject to liability.

We perceive no incongruity in limiting the liability of the ship and its owners, without similarly limiting the stevedore's liability for its tort. The extent of the latter's liability was apparently not in contemplation in the drafting of

the statute, or the bill of lading to which it was not a party. The principle that independent liabilities, differently measured, may co-exist, was given recognition by Judge Chesnut in *The Steel Inventor*, 35 F. Supp. 986, 996, 997 (1940).

It is, of course, true that the practice of using stevedores' services in loading and unloading ships was well known both when Cogsa was enacted and when the bill of lading was executed. In the absence of any reference to the stevedore in defining the statutory or contractual limitation of the carrier's liability, it does not follow that the stevedore was to be included. Rather, the silence of Congress and the contracting parties suggests that only the carrier's and not the stevedore's liability was to be affected. In *Wilson* v. *Darling Island Stevedoring and Lighterage Co., Ltd.* (1956), Argus Law Reports 311, 29 Australian Law Journal 740, in a concurring opinion, Judge Kitto of the Australian Supreme Court says:

> [fol. 58] "A necessity for the carrier to depend upon others to perform his obligations under the contract suggests a strong reason why he should have desired to stipulate for immunity for himself from liability for loss or damage in the course of the performance of those obligations. But there is no such readily discernible reason why he should concern himself to make, or should be understood as making, a similar stipulation for the benefit of those whom he should engage as servants, stevedores and the like and still less is there any ground for understanding the consignor as conceding immunity to such persons. The train of thought of which the exemption clause is a natural expression is that, since the carrier has no alternative but to rely upon others to do the work involved in producing the result contracted for, it is mutually agreeable that he should not have to bear responsibility for any failure of theirs to observe proper standards in the work they do, but that the consignor shall look to them alone to make good any loss or damage which their defaults may cause."

It is urged upon us that the Restatement (2 A.L.I. Restatement, Agency, Sec. 347) entitled the stevedore to the

limitation made in favor of the ship. The cited section reads: "An agent who is acting in pursuance of his authority has such immunities of the principal as are not personal to the principal." Assuming that "immunities" includes a limitation of liability, this still leaves unanswered the question, is the "immunity" conferred by the act and the bill of lading personal to the ship and its owner? We think it is meant for the ship and its owner, not the stevedore. See 66 Harv. L. Rev. 530. If there were a contrary [fol. 59] intent, nothing would have been easier than to say in the statute or in the bill of lading that the limitation applies to the ship, its owners and loading agents. As already noted, not only is the statute silent as to stevedores, but there was no suggestion, so far as we can discover, in the legislative history, that stevedores were expected to be included in the statutory limitation. It is not for us to speculate that the protective policy which Congress thought appropriate in respect to shipowners might well be extended to others.

The bill of lading defines the term "carrier" to include "owners, vessels, masters and charterers thereof, and any substituted or continuing carrier." By no natural or reasonable interpretation does the stevedore fit within any of these categories. We do not think that the broader interpretation of the definition, urged by the stevedore, is required or appropriate here.

The *Collins* case was cited approvingly in a brief opinion giving a stevedore the benefit of the one-year limitation for suit under Cogsa, *United States* v. *The South Star*, 210 F. 2d 44 (2d cir., 1954). The District Court for the Eastern District of Pennsylvania in *Autobuses Modernos, S. A.*, v. *The Federal Mariner*, 125 F. Supp. 780 (1954), extended the Cogsa limitation of liability to the owner and charterer, citing *Collins*. Relying on *Collins* and two New South Wales cases, *Waters Trading Co., Ltd.*, v. *Dalgety & Co., Ltd.* (1951), 2 Ll. L. Rep. 385, and *Gilbert Stokes & Kerr Prop., Ltd.*, v. *Dalgety & Co., Ltd.* (1948), 81 Ll. L. Rep. 337, the Municipal Court of New York City, in *Ford Motor Company* v. *Jarka Corporation*, 1954 AMC 1095, held that a stevedore was entitled to Cogsa's benefits. Both of the New South Wales cases, however, have since been specifically

[fol. 60] overruled by the Supreme Court of Australia in *Wilson* v. *Darling Island, etc.*, supra, also by a divided Court, with elaborate opinions supporting both views. The United States District Court for the Eastern District of Michigan, Southern Division, however, recently agreed with the *Collins* dissent and with the decision of Judge Thomsen in this case. *International Milling Co.* v. *Steamship "Perseus" and Nicholson Transit Company* (No. 14,373, Unreported—1957).

We do not think that the rule recognized by the Supreme Court in *Reid* v. *Am. Exp. Co.*, 241 U.S. 544, has been altered by Cogsa. Nothing in the statute points to any purpose to depart from the Court's view that a ship and its owner may have a limitation of their liability, while a third party tortfeasor, including a stevedore, may remain fully liable. The reasoning underlying Chief Justice White's adjudication remains unimpeached, and that case has not, in our judgment, been effectually distinguished from this.

The interesting suggestion is made that the stevedore should be entitled to the ship's limitation of liability, inasmuch as the stevedore's employees, because they do the work formerly performed by the crew, are entitled, equally with seamen, to maintain actions against the ship for unseaworthiness. *International Stevedoring Company* v. *Haverty*, 272 U.S. 50; *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85; *Peterson* v. *Alaska SS. Co.*, 347 U.S. 396. It requires no argument to demonstrate that the considerations underlying these decisions have no relation to the present issue, and we are certainly not at liberty to extend their doctrine into this area of the law.

We agree with the District Judge that limitation of liability is not automatically available to a stevedore who negli- [fol. 61] gently damages cargo.

The plaintiffs advanced the further contention, which the Court below accepted and assigned as a second ground for decision against the claimed limitation, namely, that when the crate fell into the harbor, the loading had not begun, but only an operation preparatory to loading, and that therefore the Cogsa period was not in effect. In the view we take of this case, it becomes unnecessary to consider this contention.

Cross-Appeal—The Interest Question

There remains the question concerning interest, raised by the cross-appeal. As this is a civil suit within the diversity jurisdiction of the court, we are, by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), obliged to apply Maryland law as to interest. *Title Guaranty & Surety Co.* v. *State of Missouri*, 105 F.2d 496, 549 (8 cir., 1939); *Grand Trunk Western R. Co.* v. *H. W. Nelson Co.*, 116 F.2d 823, 841 (6 cir., 1941); *Chesapeake & Ohio Ry. Co.* v. *Elk*, 186 F.2d 30 (4 cir., 1950).

Maryland recognizes a difference in this respect between suit on a contract to pay money on a day certain, as in the case of a bill of exchange or promissory note, or a contract for the payment of interest, in which cases interest is due as a matter of right; and others in which the allowance of interest is ordinarily discretionary, "according to the equity and justice appearing between the parties on a consideration of all the circumstances of the particular case." *Newson's Admr.* v. *Douglass*, 7 H. & J. 417, 453 (1826); see *Frank V. Morrison, et al., Receivers*, 55 Md. 399, 408 (1881); *Boucher* v. *Federal Baseball Club*, 130 Md. 635, 643-4, 101 A. 534 (1917).

[fol. 62] However, the gulf between the two categories—in the first of which interest is allowed as of right, and the other, where the allowance is discretionary—is not as wide as might be supposed. Increasingly, the tendency of the courts has been to treat interest as part of the just compensation due an injured party. 15 Am. Jur., "Damages," Sec. 159 *et seq.*; 1 OLECK, DAMAGES TO PERSONS AND PROPERTY (1957), Sec. 295, p. 623; A.L.I., RESTATEMENT, TORTS, 927 (c). Maryland is one of the states in which this tendency was manifested early. In *Corner* v. *Mackintosh*, 48 Md. 374, 389 (1878), a suit for trespass to chattels, the Maryland Court of Appeals said: "The plaintiff is entitled to recover all the legal damages which he has sustained; and nothing less than the value of the property, with interest on the amount, would be legal or just compensation." See also: *Moore* v. *Schultz*, 31 Md. 418 (1869), another case of trespass d. b. a.

It is, therefore, correct to say that where the rule is that interest is discretionary, it has been applied with increasing discrimination, the discretion being regarded as judicial rather than arbitrary, so that interest is not withheld when justice requires its allowance.

Although at early common law, interest was not allowable in actions of tort, it is now almost universally recognized that interest is recoverable upon the value of chattels tortiously converted, destroyed, or damaged. A.L.I., RESTATEMENT, TORTS, Sec. 913, Comment (a), subsection (1); Anno.: "Interest on Amount of Damage, 36 A.L.R. 2d 337, Sec. 63, *et seq.*, p. 473 *et seq.*; 1 OLECK, DAMAGES TO PERSONS AND PROPERTY (1957) Sec. 300, p. 641, *et seq.* For Maryland cases in which interest was allowed in actions of conversion, see *Andrews* v. *Clark*, [fol. 63] 20 A. 429, 434, 72 Md. 396 (1890); *Seaboard Airline Ry. Co.* v. *Phillips*, 70 A. 232, 237, 108 Md. 285 (1908); *Merchants' Nat. Bank* v. *Williams*, 72 A. 1114, 1117, 110 Md. 334 (1909); *Saunders* v. *Mullinix*, 72 A.2d 720, 722, 195 Md. 235 (1950).

Where recovery is for bodily harm, emotional distress, or similar intangible elements of damage insusceptible of precise measurement, the award is presumed to be comprehensive, and an additional allowance of interest is denied; but where valuation is reasonably estimable, as for the loss of a chattel, the injury is ordinarily not redressed by allowing only the value of the chattel in disregard of loss of the use of money thereby occasioned.

The same is true where the plaintiff has been compelled, as is the case here, to continue payments over a period of time during which he was deprived of the benefit to which those payments entitled him, as in this case. Indeed, the Restatement recognizes that under the modern rule, even in suits for bodily harm, the delay in compensation after the plaintiff has incurred financial loss, is an element to be considered in assessing damages. Where, as here, the plaintiff was compelled to lay out large sums over a period of years, full compensation would be denied him if he were not permitted to recover interest on the amount of his expenditures. As to those damages which represent substantial expenditures of definite sums, the claims became, in essence,

ascertained from the time when the proven outlays were made, and interest should be computed on them.

In *Chesapeake & Ohio Railway* v. *Elk Refining Co.*, 186 F.2d 30 (1950), where there was recovery for the negligent destruction of a tractor-trailer, this Court modified the [fol. 64] judgment by the addition of interest. The case arose under West Virginia law. Judge Parker said:

> "An award two years after an injury occurs is certainly not the equivalent of an award made at the time of the injury; and the great weight of authority is to the effect that full compensation for damage to or destruction of property requires that, even in the case of unliquidated damages, account be taken of the period that has elapsed between the damage and the award and that allowance be made for interest.
>
> * * * * *
>
> "'Is there any reason why a person sustaining injury and damage to his property from the negligent act of another should not receive just what he has lost as nearly as this may be accomplished in a court of justice? If a person's property is destroyed or damaged, why is he not entitled to be compensated to the full extent of its value in money so that he may replace the same with other property of a like nature? If on the day of its injury or destruction he restores or replaces it with his own money, why is he not entitled to interest on that money to the date of repayment? If he had loaned the money to some one, he certainly would be entitled to interest, and, if he borrowed it from some one, he would likely have to pay interest for its use. By being awarded legal interest, therefore, he is simply placed in statu quo, and nothing short of this is full compensation, and that is just what the law aims to accomplish.'"

It is well established that where the lost or damaged article has a market value, interest is computed upon that [fol. 65] value (See: *King* v. *McGuff*, 234 S.W. 2d 403, 149 Tex. 432 (1950); *Rode* v. *Adley Express Co.*, 33 A.2d

329, 130 Conn. 274 (1943)); and where it is not to be had on the market, the contract price (less salvage value in case of damage) should be the basis. See, A.L.I., RESTATEMENT, TORTS, Sec. 917, Ill. 1.

What Judge Parker pointed out in *Elk Refining Co.* is true here, namely, that while not liquidated in the strict sense of the term, the damage was readily ascertainable. The direct damage to the press, found to be $18,290.00, was promptly ascertainable, and other items, particularly the out of pocket expenses incurred in travel to Spain and necessary engineering work there, later became ascertainable.

In the instant case, the District Judge, after carefully sifting the evidence, allowed certain claimed damages and disallowed others. He declined to add interest because of the "plaintiffs' padding of their claim." There is no further explanation, and the precise ground for the statement is left uncertain. If it means that a plaintiff who claims more than he ultimately recovers is automatically to be denied interest on that part of the claim which he establishes to the court's satisfaction, it is an erroneous rule. If it means that the plaintiff has acted fraudulently and that it would be inequitable, under the circumstances, to allow him interest, a different situation is presented. If it means that by asserting an exorbitant demand, the plaintiff in fact discouraged settlement, he would not be justly entitled to interest during the interval of delay occasioned by him. And a plaintiff might in justice have disentitled himself to interest as to some part of his claim, without affecting other parts.

We think that the ground upon which the Court acted on [fol. 66] this question needs to be clarified. Accordingly, while affirming as to the award heretofore made, the case will be remanded for further consideration and such action as to nterest (sic) as are not inconsistent with the views here expressed, and as the District Court may deem appropriate.

Judgment affirmed and case remanded.

[fol. 67]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7620

ROBERT C. HERD & COMPANY, INC., a Maryland Corporation,
Appellant and Cross-Appellee,

vs.

KRAWILL MACHINERY CORPORATION, KRAUS MANUFACTURING CORPORATION and ENGINEERING INDUSTRIES INTERNATIONAL, S.A., Appellees and Cross-Appellants.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JUDGMENT—Filed and Entered June 16, 1958

This Cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed; that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further consideration and such action as to interest as are not inconsistent with the views expressed in the opinion of the Court filed herein, and as the District Court may deem appropriate; and that the costs on appeal be paid by the appellant and cross-appellee.

June 16, 1958.

Simon E. Sobeloff, Chief Judge, Fourth Circuit.

July 15, 1958, petition of appellant and cross-appellee for stay of mandate filed.

[fol. 68]

IN UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ORDER STAYING MANDATE—July 16, 1958
Filed July 17, 1958.

Upon the petition of the appellant and cross-appellee, by its counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above entitled case be, and it is hereby, stayed pending the application of the appellant and cross-appellee in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application for a writ of certiorari is filed in the Supreme Court within *30* days from this date.

July 16, 1958.

Clement F. Haynsworth, Jr., United States Circuit Judge.

[fol. 69] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 70]

SUPREME COURT OF THE UNITED STATES

No. 276, October Term, 1958

ROBERT C. HERD & COMPANY, INC., Petitioner,

vs.

KRAWILL MACHINERY CORPORATION, KRAUS MANUFACTURING CORPORATION, and ENGINEERING INDUSTRIES INTERNATIONAL, S.A.

ORDER ALLOWING CERTIORARI—Filed October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

KEY TO BRIEFS

1 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUT

2 BRIEF FOR RESPONDENTS IN OPPOSITION

3 BRIEF FOR PETITIONER

4 BRIEF OF AMICUS CURIAE, THE NATIONAL ASSOCIATION OF STEVEDORES, FILED IN SUPPORT OF PETITIONER

5 BRIEF FOR RESPONDENTS

6 BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS, AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 276

ROBERT C. HERD & COMPANY, INC.,
Petitioner,

VERSUS

KRAWILL MACHINERY CORPORATION,
KRAUS MANUFACTURING CORPORATION

AND

ENGINEERING INDUSTRIES INTERNATIONAL, S.A.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GEORGE W. P. WHIP,
ROBERT E. COUGHLAN, JR.,
Attorneys for Petitioner,
Robert C. Herd & Company, Inc.

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IN THE

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ROBERT C. HERD & COMPANY, INC.,
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KRAWILL MACHINERY CORPORATION,
KRAUS MANUFACTURING CORPORATION
AND
ENGINEERING INDUSTRIES INTERNATIONAL, S.A.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner (Robert C. Herd & Company, Inc.) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case.

CITATION OF OPINIONS BELOW

The opinion of the Court of Appeals (Chief Judge Sobeloff) is not yet reported in the Federal Reporter. It is printed in the record in Vol. 2, at pages 3-18, inclusive. A printed copy is annexed hereto as an Appendix.

The opinion of the District Court (Chief Judge Thomsen) is reported in 145 F. Supp. 554. It is printed in the record in Vol. 1, at pages 16-37, inclusive.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1958. The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254(1).

QUESTIONS OF LAW PRESENTED

Is a stevedoring company which has been employed by a vessel owner to load cargo on his vessel, a general ship, for carriage from a United States Port to a foreign port, entitled to the benefits of limited liability as provided for in the Carriage of Goods By Sea Act (46 U. S. C. A. Secs. 1304(5) and 1307) and the contracts of carriage entered into between the cargo owner and the vessel owner as evidenced by the bills of lading?

STATEMENT OF THE CASE

Pursuant to contracts, as evidenced by bills of lading, prepared by representatives of Krawill Machinery Corporation and Associates which were accepted by the master and general agent of the SS CASTILLO AMPUDIA whereby the owners of the SS CASTILLO AMPUDIA agreed to carry certain packages or cases of machinery from Baltimore, Maryland, to Valencia, Spain, on their said vessel, the general agents of the vessel employed Petitioner,

Robert C. Herd & Company, Inc., stevedores, to load the shipment (R. Stip. pp. 14-15, Vol. 1) (Hatchel R. pp. 11-12, Vol. 1) (Opinion, District Court, R. pp. 17, 19, Vol. 1). The loading equipment of the vessel being too light to lift the cases, Petitioner employed a derrick from the Bethlehem Steel Company for that purpose and on April 14, 1954, while loading operations were in progress, one of the packages or cases slipped from the slings and landed in the water which caused damage to its contents (Carroll, R. p. 9, Vol. 1); (Wilkinson, R. pp. 2-4, Vol. 1); (Jenkins, R. pp. 6-8, Vol. 1); (Opinion, District Court, R. pp. 17-20, Vol. 1).

The bills of lading, among other things, contained the following provisions:

> "7. The Carrier's responsibility in respect of the Goods as a Carrier shall not attach until the Goods are actually loaded for transportation upon the Vessel, and shall terminate, without notice, as soon as the Goods leave the Vessel's tackles at destination or other place where the Carrier is authorized to make delivery or end its responsibility. Any responsibility of the Carrier in respect of the Goods attaching prior to such loading or continuing after leaving the Vessel's tackles as aforesaid, whether the Goods are in course of lighterage by the Carrier or however else the same may be situated, shall be the same only as that of a Warehouseman, without liability on the part of the Carrier, exemptions, exceptions and limitations of the liability of the Carrier, contained in this contract shall be deemed to apply also to such Warehouseman's liability as well as to liability as a Carrier. * * *
>
> "30. In consideration of a choice of freight rates having been offered to the shipper by the Carrier, it is agreed that in case of loss of, or damage to * * * goods of an actual value exceeding $500 * * * per package or, in case of goods not shipped in packages, per customary freight unit, the value of such goods, shall be deemed

to be $500 per package or per said unit and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per said unit and pro rata in case of partial loss or damage, unless the nature of such goods and a value higher than $500 per package or per said unit shall have been declared in writing by the shipper upon delivery to the Carrier and noted on the face hereof and unless payment of the extra freight charge incident thereto shall have been made or promised * * *, in which case such declared value, or the actual value if less, shall be the basis for computing damages and any partial loss or damage shall be adjusted pro rata. * * *

"37. This bill of lading shall have effect subject to the Carriage of Goods by Sea Act of the U.S.A. and the carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act. To the extent that any term of this bill of lading is repugnant to or inconsistent with anything in such Act, it shall be void."

(Opinion, District Court, R. pp. 18-19; Vol. 1).

RULINGS OF THE LOWER COURTS

Krawill Machinery Corporation and Associates filed suit in the United States District Court for the District of Maryland against Petitioner and Bethlehem Steel Company, owner of the Derrick which was being used in the loading operation. After trial, the Court held that the damage to the contents in the case was caused solely by negligence on the part of Robert C. Herd & Company, Inc., the Petitioner, and it entered judgment against the Petitioner for the damages which Plaintiffs sustained without benefit of limitation of liability provided for in the Carriage of Goods By Sea Act (46 U. S. C. A., Sec. 1304(5) and Sec. 1307) or in the bills of lading. It held that no part or provision of the Carriage of Goods By Sea Act was meant to protect or

to apply to any other than the shipper and the carrier. It likewise held that although the contracts, as evidenced by the bills of lading, pursuant to which the shipment was made, bound the shipper and the ship owner from the time the cases were delivered into the charge or custody of the carrier, they had no application to the stevedore who was doing the loading or the discharging (Opinion, District Court, R. pp. 16-37, Vol. 1).

The Circuit Court of Appeals affirmed the District Court and ruled that neither the Carriage of Goods By Sea Act nor the contracts of carriage, as evidenced by the bills of lading, applied to or concerned the stevedore in any respect (Opinion, Circuit Court of Appeals, App. A).

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals in this case is in direct conflict with the decisions of the Circuit Courts of Appeals for the Fifth and Second Circuits.

In *A. H. Collins & Co. v. Panama Railroad Company*, 197 F. (2d) 893, 895, certiorari denied, 344 U. S. 875, 97 L. Ed. 677, the Circuit Court of Appeals for the Fifth Circuit held that a stevedore who had been employed by a ship owner to discharge cargo from his ship should have the benefit of a limitation of liability provision contained in the contract of carriage, as evidenced by the bill of lading. It held further that the limitation of liability provided for in the Carriage of Goods By Sea Act and in the contract of carriage extended to any agency by means of which the carrier performed his contract.

The Collins case was approved and followed by the United States Circuit Court of Appeals for the Second Circuit in the SOUTH STAR, 210 F. (2d) 44, 45, and by Lower Courts in the following cases:

Autobuses Modernos, S. A. v. Federal Mariner, etc., 125 F. Supp. 780 (E. D. Pa.);

Adriana Chutter v. KLM Royal Dutch Airlines, 132 F. Supp. 611 (S. D. N. Y.);

National Federation of Coffee Growers of Colombia against Isbrandtsen Company, Inc., 1957 A. M. C. 1571 (Supreme Court State of New York);

Ford Motor Company v. Jarka Corporation, 1954 A. M. C. 1095 (Municipal Court of New York City);

Berger v. 34th Street Garage, Inc., 3 N. Y. 2d 701; 148 N. E. 2d 883.

CONCLUSION

By reason of the premises, a writ of certiorari should issue to review the decision of the Circuit Court of Appeals herein.

Respectfully submitted,

GEORGE W. P. WHIP,

ROBERT E. COUGHLAN, JR.,

Attorneys for Petitioner, Robert C. Herd & Company, Inc.

Dated: August 11, 1958.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7620

Robert C. Herd & Company, Inc.,
a Maryland Corporation,
Appellant and Cross-Appellee,
versus
Krawill Machinery Corporation,
Kraus Manufacturing Corporation and
Engineering Industries International, S. A.,
Appellees and Cross-Appellants.

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

SOBELOFF, Chief Judge:

A stevedoring company was held liable in a civil suit in the United States District Court for the District of Maryland in the sum of $47,992.04, the full amount of resulting damage when a crated press fell into the Baltimore Harbor. The defendant's appeal challenges the amount of the judgment awarded. It claims the benefit of the limitation provisions of the Carriage of Goods by Sea Act (popularly called "Cogsa"), 46 U.S.C.A. 1300-1315,[1] and parallel pro-

[1] The limitation of liability in respect to cargo is found in 46 U.S.C.A. Sec. 1304 (5).

"Sec. 1304. *Rights and immunities of carrier and ship. Unseaworthiness.*

* * * * * *

"*Amount of liability, valuation of cargo*

"(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package

visions of the bill of lading,[2] which limit the liability of the carrier to the sum of $500.00 per package or customary freight unit. The District Judge held that while the carrier's liability is so limited, the stevedore's is not. The

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lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

"By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: Provided, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained

"Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading."

[2] The bill of lading of the carrier contained, among others, the following provisions:

"30. In consideration of a choice of freight rates having been offered to the shipper by the Carrier, it is agreed that in case of loss of, or damage to * * * goods of an actual value exceeding $500 * * * per package or, in the case of goods not shipped in packages, per customary freight unit, the value of such goods, shall be deemed to be $500 per package or per said unit and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per said unit and pro rata in case of partial loss or damage, unless the nature of such goods and a value higher than $500 per package or per said unit shall have been declared in writing by the shipper upon delivery to the Carrier and noted on the face hereof and unless payment of the extra freight charge incident thereto shall have been made or promised * * *, in which case such declared value, or the actual value if less, shall be the basis for computing damages and any partial loss or damage shall be adjusted pro rata. * * *

"37. This bill of lading shall have effect subject to the Carriage of Goods by Sea Act of the U. S. A. and the Carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act. To the extent that any term of this bill of lading is repugnant to or inconsistent with anything in such Act, it shall be void."

plaintiff cross-appeals, complaining of the Court's refusal to allow interest.

The crate containing the press was one of sixty-two cases or crates of machinery and equipment which Krawill Machinery Corporation of Detriot had sold and agreed to deliver to a Spanish purchaser. The particular crate involved in this suit had been loaded on a flat car and brought by rail from Detriot to the dock in Baltimore alongside which the SS CASTILLO AMPUDIA was moored, and the press was to be loaded on the ship by Robert C. Herd and Co., Inc., the stevedore, and carried to Valencia, Spain. The case was eight feet wide, five feet long, and eleven feet high, and weighed nineteen tons. As this was, in the judgment of the defendant's manager, too heavy to be lifted by the ship's gear, he arranged for the Bethlehem Steel Company's floating derrick to assist in the loading. The derrick was moored alongside the ship's offshore side, and the derrick's boom was swung over and across the ship's deck so that the hook and gear were suspended over the flat car. As it was found that the regular wire sling could not be slipped under the heavy crate, it was decided to work a thinner wire under the crate, attach it to the hook of the derrick, and then as the crane lifted the crate a very short distance, the regular sling could be inserted under it.

The work was under the sole direction of the stevedore's gang leader, who stood on the pier and gave signals to his man on the deck, who was to relay them to the operator of the derrick. The latter was not informed that the plan was to lift the crate preliminarily only a few inches. Due to a miscalculation of the stevedore's foreman as to the reaction time of the deckman and the derrick operator in the execution of their orders, there was a failure of coordination between the man who signalled from the pier, the man who stood on the deck, and the operator of the derrick. The preliminary lift given the crate was more than the few inches intended. The crate being topheavy, its center of gravity shifted and it fell into the water. The District Judge's finding that the stevedore's foreman was negligent, is well supported and, indeed, is not contested on appeal.

We turn to the pertinent statute. Section 4 (5) of Cogsa, codified as 46 U.S.C.A., Sec 1304 (5), is the limitation of damage section. By its express provision, neither the *carrier nor the ship* is liable in an amount exceeding $500.00 per package. Stevedores and others who may become responsible for loss or damage in connection with the movement of goods are not mentioned in this section, and the rights and responsibilities, liabilities and limitations upon liability, with which the act deals are generally in terms of carrier and ship vis-a-vis shipper. Nothing in the language or history of the legislation indicates a purpose to regulate the stevedore's liability.

The Harter Act (46 U.S.C.A., Sec. 190 *et seq.*), which preceded Cogsa, likewise did not deal specifically with the liability of the stevedore, and was considered to apply to the relation between the cargo shipper or owner and the ship or its owner, and not to the stevedore's liability. POOR, CHARTER PARTIES AND OCEAN BILLS OF LADING (3d Ed., 1948), Sec. 306, p. 129; Green, "The Harter Act," 16 Harv. L. Rev. 157, 177..

In *Reid v. Am. Exp. Co.*, 241 U. S. 544 (1916), where a bill of lading covering the shipment of an automobile limited the carrier's liability to $100.00, this limitation was enforced as to the carrier. In the same case, however, the stevedore, by whose negligence the automobile was dropped into the harbor, was declared by the Supreme Court liable for the full amount. This was considered the settled law for many years.

Although the later-enacted (1936) Cogsa dealt with the reciprocal rights and obligations of shippers and carriers, there is nothing to intimate that in enacting it, Congress meant to change the announced rule as to the stevedore's independent unlimited liability.

More recently, however, a sharp difference of opinion has arisen on this point. In the Fifth Circuit, in *A. M. Collins & Co. v. Panama R. Co.*, 197 F. 2d 893 (1952), cert. den. 344 U. S. 875, the majority, in an opinion by Judge Rives, accorded a stevedore operating in the Canal Zone the bene-

fit of the $500.00 limitation. The Court's rationale was that the stevedore was the ship's agent and therefore entitled to any immunity to which the ship was entitled.

We note preliminarily that the case before us may be different, for unlike *Collins*, we have here evidence that on the eastern seaboard, stevedores base their charges upon such factors as weight, difficulty of handling, etc., and do not, like the carrier, offer a choice of rates in which the declared value of the cargo and the amount of possible liability is considered in fixing the charge. There is, accordingly, less reason in the instant case to infer, as did the majority in *Collins*, that the limitation of liability in the bill of lading related to or was relied on by the stevedore or that the carrier and shipper intended to contract for its benefit. Herd and Company had no contract with the shipper, and its agreement with the shipper's agent included no limitation of liability.

However this may be, Judge Holmes' dissent in *Collins* reasons that a stevedore is subject to the ordinary liability for its negligence; that immunity (or limitation of liability) is the exception and not the rule; that the right of the carrier to limit its liability for negligence to an amount not exceeding $500.00, being in derogation of the common law, should be strictly construed, and may not be availed of by one who is not a party to the bill of lading. He thought *Reid v. Am. Exp. Co.*, supra, sufficient authority for his position, but also invoked the general principle that an agent who violates a duty to a third party is liable for failing in his common law obligation not to injure another. 3 C.J.S., "Agency," Sec. 221. "The liability of an agent for his own negligence has long been imbedded in the law." *Brady v. Roosevelt SS Co.*, 317 U. S. 575, 580 (1943). In declining to make an inference that a private operator of a government vessel, an agent of an immune government corporation, had likewise been immunized, the Supreme Court said "if Congress had intended to make such an inroad on the rights of claimants it would have said so in unambiguous terms." P. 581.

The bill of lading, concluded Judge Holmes' dissent, limited the carrier's liability to $500.00, "but it did not confer upon the carrier the power to diffuse partial dispensation to its negligent stevedores or other agents for their wrongful acts." 197 F. 2d 893, 898.

With the highest respect to the majority opinion in *Collins*, Judge Holmes' reasoning commends itself to us more. It is not unknown in the law for several liabilities to arise from a single injury and, unless commanded by law or agreed to by the parties, there is no requirement that the same measure of damages shall apply to all persons subject to liability.

We preceive no incongruity in limiting the liability of the ship and its owners, without similarly limiting the stevedore's liability for its tort. The extent of the latter's liability was apparently not in contemplation in the drafting of the statute, or the bill of lading to which it was not a party. The principal that independent liabilities, differently measured may co-exist, was given recognition by Judge Chesnut in *The Steel Inventor*, 35 F. 986, 996, 997 (1940).

It is, of course, true that the practice of using stevedores' services in loading and unloading ships was well known both when Cogsa was enacted and when the bill of lading was executed. In the absence of any reference to the stevedore in defining the statutory or contractual limitation of the carrier's liability, it does not follow that the stevedore was to be included. Rather, the silence of Congress and the contracting parties suggests that only the carrier's and not the stevedore's liability was to be effected. In *Wilson v. Darling Island Stevedoring and Lighterage Co., Ltd.* (1956), Argus Law Reports 311, 29 Australian Law Journal 740, in a concurring opinion, Judge Kitto of the Australian Supreme Court says:

> "A necessity for the carrier to depend upon others to perform his obligations under the contract suggests a strong reason why he should have desired to stipulate for immunity for himself from liability for loss or damage in the course of the performance of those ob-

ligations. But there is no such readily discernible reason why he chould concern himself to make, or should be understood as making, a similar stipulation for the benefit of those whom he should engage as servants, stevedores and the like and still less is there any ground for understanding the consignor as conceding immunity to such persons. The train of thought of which the exemption clause is a natural expression is that, since the carrier has no alternative but to rely upon others to do the work involved in producing the result contracted for, it is mutually agreeable that he should not have to bear responsibility for any failure of theirs to observe proper standards in the work they do, but that the consignor shall look to them alone to make good any loss or damage which their defaults may cause."

It is urged upon us that the Restatement (2 A.L.I. Restatement, Agency, Sec. 347) entitled the stevedore to the limitation made in favor of the ship. The cited section reads: "An agent who is acting in pursuance of his authority has such immunities of the principal as are not personal to the principal." Assuming that "immunities" includes a limitation of liability, this still leaves unanswered the question, is the "immunity" conferred by the act and the bill of lading personal to the ship and its owner? We think it is meant for the ship and its owner, not the stevedore. See 66 Harv. L. Rev. 530. If there were a contrary intent, nothing would have been easier than to say in the statute or in the bill of lading that the limitation applies to the ship, its owners and loading agents. As already noted, not only is the statute silent as to stevedores, but there was no suggestion, so far as we can discover, in the legislative history, that stevedores were expected to be included in the statutory limitation. It is not for us to speculate that the protective policy which Congress thought appropriate in respect to shipowners might well be extended to others.

The bill of lading defines the term "carrier" to include "owners, vessels, masters and charterers thereof, and any

substituted or continuing carrier." By no natural or reasonable interpretation does the stevedore fit within any of these categories. We do not think that the broader interpretation of the definition, urged by the stevedore, is required or appropriate here.

The *Collins* case was cited approvingly in a brief opinion giving a stevedore the benefit of the one-year limitation for suit under Cogsa *United States v. The South Star*, 210 F. 2d 44 (2d cir., 1954). The District Court for the Eastern District of Pennsylvania in *Autobuses Modernos, S. A., v. The Federal Mariner*, 125 F. Supp. 780 (1954), extended the Cogsa limitation of liability to the owner and charterer, citing *Collins*. Relying on *Collins* and two New South Wales cases, *Waters Trading Co., Ltd., v. Dalgety & Co., Ltd.* (1951), 2 L1. L. Rep. 385, and *Gilbert Stokes & Kerr Prop., Ltd., v. Dalgety & Co., Ltd.* (1948), 81 L1. L Rep. 337, the Muncipal Court of New York City, in *Ford Motor Company v. Jarka Corporation*, 1954 AMC 1095, held that a stevedore was entitled to Cogsa's benefits. Both of the New South Wales cases, however, have since been specifically overruled by the Supreme Court of Australia in *Wilson v. Darling Island, etc.*, supra, also by a divided Court, with elaborate opinions supporting both views. The United States District Court for the Eastern District of Michigan, Southern Division, however, recently agreed with the *Collins* dissent and with the decision of Judge Thomsen in this case. *International Milling Co. v. Steamship "Perseus" and Nicholson Transit Company* (No. 14,373, Unreported — 1957).

We do not think that the rule recognized by the Supreme Court in *Reid v. Am. Exp. Co.*, 241 U. S. 544, has been altered by Cogsa. Nothing in the statute points to any purpose to depart from the Court's view that a ship and its owner may have a limitation of their liability, while a third party tortfeasor, including a stevedore, may remain fully liable. The reasoning underlying Chief Justice White's adjudication remains unimpeached, and that case has not, in our judgment, been effectually distinguished from this.

The interesting suggestion is made that the stevedore should be entitled to the ship's limitation of liability, inasmuch as the stevedore's employees, because they do the work formerly performed by the crew, are entitled, equally with seamen, to maintain actions against the ship for unseaworthiness. *International Stevedoring Company v. Haverty*, 272 U. S. 50; *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Peterson v. Alaska SS Co.*, 347 U. S. 396. It requires no argument to demonstrate that the considerations underlying these decisions have no relation to the present issue, and we are certainly not at liberty to extend their doctrine into this area of the law.

We agree with the District Judge that limitation of liability is not automatically available to a stevedore who negligently damages cargo.

The plaintiffs advanced the further contention, which the Court below accepted and assigned as a second ground for decision against the claimed limitation, namely, that when the crate fell into the harbor, the loading had not begun, but only an operation preparatory to loading, and that therefore the Cogsa period was not in effect. In the view we take of this case, it becomes unnecessary to consider this contention.

Cross-Appeal — The Interest Question

There remains the question concerning interest, raised by the cross-appeal. As this is a civil suit within the diversity jurisdiction of the court, we are, by *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), obliged to apply Maryland law as to interest. *Title Guaranty & Surety Co. v. State of Missouri*, 105 F. 2d 496, 549 (8 cir., 1939); *Grand Trunk Western R. Co. v. H. W. Nelson Co.*, 116 F. 2d 823, 841 (6 cir., 1941); *Chesapeake & Ohio Ry. Co. v. Elk*, 186 F. 2d 30 (4 cir., 1950).

Maryland recognizes a difference in this respect between suit on a contract to pay money on a day certain, as in the case of a bill of exchange or promissory note, or a contract for the payment of interest, in which cases interest is due

as a matter of right; and others in which the allowance of interest is ordinarily discretionary, "according to the equity and justice appearing between the parties on a consideration of all the circumstances of the particular case." *Newson's Admr. v. Douglass*, 7 H. & J. 417, 453 (1826); see *Frank V. Morrison, et al., Receivers*, 55 Md. 399, 408 (1881); *Boucher v. Federal Baseball Club*, 130 Md. 635, 643-4 101 A. 534 (1917).

However, the gulf between the two categories — in the first of which interest is allowed as of right, and the other, where the allowance is discretionary — is not as wide as might be supposed. Increasingly, the tendency of the courts has been to treat interest as part of the just compensation due an injured party. 15 Am. Jur., "Damages," Sec. 159 *et seq.*; 1 OLECK, DAMAGES TO PERSONS AND PROPERTY (1957), Sec. 295, p. 623; A.L.I. RESTATEMENT, TORTS, 927 (c). Maryland is one of the states in which this tendency was manifested early. In *Corner v. Mackintosh*, 48 Md. 374, 389 (1878), a suit for trepass to chattels, the Maryland Court of Appeals said: "The plaintiff is entitled to recover all the legal damages which he has sustained; and nothing less than the value of the property, with interest on the amount, would be legal or just compensation." See also: *Moore v. Schultz*, 31 Md. 418 (1869), another case of trepass d. b. a.

It is therefore, correct to say that where the rule is that interest is discretionary, it has been applied with increasing discrimination, the discretion being regarded as judicial rather than arbitrary, so that interest is not withheld when justice requires its allowance.

Although at early common law, interest was not allowable in actions of tort, it is now almost universally recognized that interest is recoverable upon the value of chattels tortiously converted, destroyed, or damaged. A.L.I., RESTATEMENT, TORTS, Sec. 913, Comment (a), subsection (1); Anno.: "Interest on Amount of Damage, 36 A.L.R. 2d 337. Sec. 63 *et seq.*, p. 473 *et seq.*; 1 OLECK, DAMAGES TO PERSONS AND PROPERTY (1957

Sec. 300, p. 641, *et seq.* For Maryland cases in which interest was allowed in actions of conversion, see: *Andrews v. Clark*, 20 A. 429, 434, 72 Md. 396 (1890); *Seaboard Airline Ry. Co. v. Phillips*, 70 A. 232, 237, 108 Md. 285 (1908); *Merchants' Nat. Bank v. Williams*, 72 A. 1114, 1117, 110 Md. 334 (1909); *Saunders v. Mullinix*, 72 A. 2d 720, 722, 195 Md. 235 (1950).

Where recovery is for bodily harm, emotional distress, or similar intangible elements of damage insusceptible of precise measurement, the award is presumed to be comprehensive, and an additional allowance of interest is denied; but where valuation is reasonably estimable, as for the loss of a chattel, the injury is ordinarily not redressed by allowing only the value of the chattel in disregard of loss of the use of money thereby occasioned.

The same is true where the plaintiff has been compelled, as is the case here, to continue payments over a period of time during which he was deprived of the benefit to which those payments entitled him, as in this case. Indeed, the Restatement recognizes that under the modern rule, even in suits for bodily harm, the delay in compensation after the plaintiff has incurred financial loss, is an element to be considered in assessing damages. Where, as here, the plaintiff was compelled to lay out large sums over a period of years, full compensation would be denied him if he were not permitted to recover interest on the amount of his expenditures. As to those damages which represent substantial expenditures of definite sums, the claims became, in essence, ascertained from the time when the proven outlays were made, and interest should be computed on them.

In *Chesapeake & Ohio Railway v. Elk Refining Co.*, 186 F. 2d 30 (1950), where there was recovery for the negligent destruction of a tractor-trailer, this Court modified the Judgment by the addition of interest. The case arose under West Virginia law. Judge Parker said:

> "An award two years after an injury occurs is certainly not the equivalent of an award made at the time of the injury; and the great weight of authority is

to the effect that full compensation for damage to or destruction of property requires that, even in the case of unliquidated damages, account be taken of the period that has elapsed between the damage and the award and that allowance be made for interest.

* * * * * *

" 'Is there any reason why a person sustaining injury and damage to his property from the negligent act of another should not receive just what he has lost as nearly as this may be accomplished in a court of justice? If a person's property is destroyed or damaged, why is he not entitled to be compensated to the full extent of its value in money so that he may replace the same with other property of a like nature? If on the day of its injury or destruction he restores or replaces it with his own money, why is he not entitled to interest on that money to the date of repayment? If he had loaned the money to some one, he certainly would be entitled to interest, and, if he borrowed it from some one, he would likely have to pay interest for its use. By being awarded legal interest, therefore, he is simply placed in statu quo, and nothing short of this is full compensation, and that is just what the law aims to accomplish.' "

It is well established that where the lost or damaged article has a market value, interest is computed upon that value (See: *King v. McGuff*, 234 S.W. 2d 403, 149 Tex. 432 (1950); *Rode v. Adley Express Co.*, 33 A. 2d 329, 130 Conn. 274 (1943)); and where it is not to be had on the market, the contract price (less salvage value in case of damage) should be the basis. See, A.L.I., RESTATEMENT TORTS, Sec. 917, Ill. 1.

What Judge Parker pointed out in *Elk Refining Co.* is true here, namely, that while not liquidated in the strict sense of the term, the damage was readily ascertainable. The direct damage to the press, found to be $18,290.00, was promptly ascertainable, and other items particularly the

out of pocket expenses incurred in travel to Spain and necessary engineering work there, later became ascertainable.

In the instant case, the District Judge, after carefully sifting the evidence, allowed certain claimed damages and disallowed others. He declined to add interest because of the "plaintiffs' padding of their claim." There is no further explanation, and the precise ground for the statement is left uncertain. If it means that a plaintiff who claims more than he ultimately recovers is automatically to be denied interest on that part of the claim which he establishes to the court's satisfaction, it is an erroneous rule. If it means that the plaintiff has acted fraudulently and that it would be inequitable, under the circumstances, to allow him interest, a different situation is presented. If it means that by asserting an exorbitant demand, the plaintiff in fact discouraged settlement, he would not be justly entitled to interest during the interval of delay occasioned by him. And a plaintiff might in justice have disentitled himself to interest as to some part of his claim, without affecting other parts.

We think that the ground upon which the Court acted on this question needs to be clarified. Accordingly, while affirming as to the award heretofore made, the case will be remanded for further consideration and such action as to interest as are not inconsistent with the views here expressed, and as the District Court may deem appropriate.

Judgment affirmed and case remanded.

JUDGMENT

Filed and Entered June 16, 1958.

UNITED STATES COURT OF APPEALS FOR THE

FOURTH CIRCUIT

No. 7620.

Robert C. Herd & Company, Inc., a Maryland Corporation,

Appellant and Cross-Appellee,

vs.

Krawill Machinery Corporation, Kraus Manufacturing Corporation and Engineering Industries International, S. A.,

Appellees and Cross-Appellants.

CROSS-APPEALS from the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed; that this cause be, and the same

Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed; that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further consideration and such action as to interest as are not inconsistent with the views expressed in the opinion of the Court filed herein, and as the District Court may deem appropriate; and that the costs on appeal be paid by the appellant and cross-appellee.

June 16, 1958.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

July 15, 1958, petition of appellant and cross-appellee for stay of mandate filed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 276

ROBERT C. HERD & COMPANY, INC.,
Petitioner,

vs.

KRAWILL MACHINERY CORPORATION,
KRAUS MANUFACTURING CORPORATION
AND
ENGINEERING INDUSTRIES INTERNATIONAL, S.A.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R.[1] 16-37) is reported at 145 F. Supp. 554, 1956 A.M.C. 2217 and (1957) 1 Lloyd's List Law Reports 40. The opinion of the Court of Appeals for the Fourth Circuit (Pet. App. 7-19) has not yet been reported in the Federal Reporter, but may be found in 1958 A.M.C. 1265.

[1] "R." refers to the joint appendix filed in the Court of Appeals.

JURISDICTION

Judgment of the Court of Appeals was entered on June 16, 1958. The petition for a writ of certiorari was filed on August 11, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is a stevedore who has offered no choice of rates based on the value of the cargo and who has negligently damaged a shipper's property entitled to limit his liability to the shipper either (1) by virtue of the Carriage of Goods by Sea Act or (2) pursuant to the proposed contract of carriage between the shipper and the carrier to which the stevedore is not a party?

STATUTE INVOLVED

The statute involved is the Carriage of Goods by Sea Act (49 Stat. 1207-1213; 46 U.S.C. §§1300-1315). Since the petition does not comply with the provisions of Rule 23(1)(d) we print §§1(e), 4(5), 7, 12 and 13 of that Act as an appendix to this brief.

STATEMENT OF THE CASE

The statement of the case contained in the petition is accurate so far as it goes, but the following additions are necessary to correct certain omissions:

The jurisdiction of the District Court was invoked because of diversity of citizenship of the parties and because the amount in controversy exceeded $3,000, exclusive of interest and costs (28 U.S.C. §1332).

The District Court found (R. 19) that the petitioner's stevedoring charges were not based on the value of the

cargo handled but were in accordance with its usual tariff providing different rates for different commodities. As was customary in the port of Baltimore, such rates were predicated upon weight, density, difficulty of handling and other factors affecting the cost of doing the stevedore work but did not vary with the value of the cargo, whether or not declared by the shipper.

The District Court further found (R. 20) that the loss occurred while the stevedore was trying, by working a thin wire under the crate lying on a flat car located on the pier alongside the vessel, to raise the crate slightly in order to place one or more chocks under the skids of the crate so that the regular lifting sling could be placed in position. The District Court subsequently concluded (R. 29) that the loss occurred prior to the time the goods were loaded on board and hence not during the period covered by the Carriage of Goods by Sea Act. That Court held that the stevedore was not entitled to limit its liability under the provisions of either the Carriage of Goods by Sea Act or of the bill of lading to which it was not a party.

The Court of Appeals found it unnecessary (Pet. App. 15) to decide whether the loss occurred during the operation preparatory to loading and hence not within the period subject to the operation of the Carriage of Goods by Sea Act, since it held that the stevedore was in no event entitled to the benefit of the limitation provisions of that Act.

ARGUMENT

1. There is not necessarily any conflict with the decisions of other Courts of Appeals on the same matter.

As heretofore noted, the rates charged by the stevedore bore no relationship to the value of the cargo being handled. The decisions in *A. H. Collins and Co. v. Panama Railroad*

Company, 197 F. 2d 893 (5 Cir. 1952), *cert. den.* 344 U.S. 875, and *United States v. The South Star*, 210 F. 2d 44 (2 Cir. 1954) — relied upon by the petitioner as establishing a conflict with this case — do not indicate that the same situation prevailed in those cases. Both the District Court (R. 31) and the Court of Appeals (Pet. App. 11) regarded the stevedore's failure to offer a choice of rates as a distinguishing factor.

Furthermore the decision in this case is not in conflict with the *Collins* decision or *The South Star* decision if it be held, as the District Court concluded, that the loss occurred prior to the period when the provisions of the Carriage of Goods by Sea Act were operative. In both the *Collins* case and *The South Star* case the decisions were based upon the Carriage of Goods by Sea Act, either because it applied *ex proprio vigore* or because it was incorporated by reference and made applicable in the bills of lading. Although clause 7 of the present bill of lading (Pet. 3) contained provisions regulating the liabilities of the carrier before loading and after discharge, it did not purport to provide that the carrier's liabilities and privileges during those periods be the same as provided in the Carriage of Goods by Sea Act. Thus, although the Court of Appeals found it unnecessary to decide the point, the District Court held that the Carriage of Goods by Sea Act was not applicable, and accordingly that the petitioner was under no circumstances entitled to the benefit of that Act. Such a basis for the decision is neither in conflict with nor comprehended by the decisions in *A. H. Collins & Co. v. Panama Railroad Company*, and *United States v. The South Star*, *supra*.

2. The question involved is not of such importance as to merit review by this Court.

There is nothing in the petition to indicate that the determination of the question presented by this case, even as stated by the petitioner, is of such importance as to justify consideration by this Court. In point of fact the question is one of very limited and narrow application, involving only one of the many phases comprising the transportation of goods in water-borne commerce. Especially when viewed in the light of the peculiar and distinguishing features heretofore mentioned, this case would appear to be lacking in the importance which this Court rightly regards as a prerequisite to review.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM A. GRIMES,

Attorney for Respondents.

LESLIE W. FLEMING,

Of Counsel.

September 8, 1958.

APPENDIX

THE CARRIAGE OF GOODS BY SEA ACT

(49 Stat. 1207-1213; 46 U.S.C. §§1300-1315)

§1. "Definitions

* * *

(e) The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship."

* * * * * *

§4. "Rights and immunities of carrier and ship — Unseaworthiness

* * *

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed; *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof

has been knowingly and fraudulently misstated by the shipper in the bill of lading."

* * * * * *

§7. "Agreement as to liability prior to loading or after discharge

Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea."

* * * * * *

§12. "Liabilities before loading and after discharge; effect on other laws

Nothing in this Act shall be construed as superseding any part of the Act entitled 'An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property,' approved February 13, 1893, 27 Stat. 445, 46 U.S. Code 190-198, or of any other law which would be applicable in the absence of this Act, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship."

§13. "Scope of chapter; 'United States'; 'foreign trade'

This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term 'United States' includes its districts, territories, and possessions. The term 'foreign trade' means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of

the United States or its possessions; *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter; *Provided further,* That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 276

ROBERT C. HERD & COMPANY, INC.,
Petitioner,

VS.

KRAWILL MACHINERY CORPORATION,
KRAUS MANUFACTURING CORPORATION
AND
ENGINEERING INDUSTRIES INTERNATIONAL, S.A.,
Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court on liability[1] was filed on October 24, 1956, and is reported in 145 F. Supp. 554 and in 1956 A.M.C. (Vol. II) 2217. The District Court's opinion on damages[2] is not involved in this proceeding. But it was filed on September 26, 1957, and is reported in

[1] Record, pages 16-37.
[2] Record, pages 37-45.

155 F. Supp. 296 and in 1957 A.M.C. (Vol. II) 2188. The opinion of the Court of Appeals[3] was filed on June 16, 1958, and is reported in 256 F. (2d) 946 (Advance Sheets) and in 1958 A.M.C. 1265.

JURISDICTION

Jurisdiction of this Court was invoked by Petition For Writ of Certiorari filed August 14, 1958, under Section 1254(1), 28 U.S.C.A. p. 42. Certiorari was granted on October 13, 1958, ... U.S. ....., 3 L. Ed. (2) Advance p. .....).

STATUTE AND BILLS OF LADING INVOLVED

The statute involved is the Carriage of Goods by Sea Act (49 Stat. 1207-1213) 46 U.S.C.A. Sections 1300-1315, pages 459-548; pertinent sections of which are herewith set forth.

Section 1301. Definitions.

When used in this chapter—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

[3] Record, pages 51-62.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship. Apr. 16, 1936, c. 229, Section 1, 49 Stat. 1208.

46 U.S.C.A. page 460.

Section 1302. Duties and rights of carrier.

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title. Apr. 16, 1936, c. 229, Section 2, 49 Stat. 1208.

46 U.S.C.A. page 462.

Section 1303. Responsibilities and liabilities of carrier and ship — Seaworthiness.

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

* * * * * *

Apr. 16, 1936, c. 229, Section 3, 49 Stat. 1208.

46 U.S.C.A. pages 462-464.

Section 1304. Rights and immunities of carrier and ship -- Unseaworthiness.

* * * * * *

Amount of liability; valuation of cargo

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: Provided, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

* * * * * *

Apr. 16, 1936, c. 229, Sec. 4, 49 Stat. 1210.
46 U.S.C.A. pages 489-490.

Section 1307. Agreement as to liability prior to loading or after discharge.

Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exception as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the

custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea. Apr. 16, 1936, c. 229, section 7, 49 Stat. 1212.

46 U.S.C.A. page 543.

Section 1311. Liabilities before loading and after discharge; effect on other laws.

Nothing in this chapter shall be construed as superseding any part of sections 190-196 of this title, or of any other law which would be applicable in the absence of this chapter insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship. Apr. 16, 1936, c. 229 Section 12, 49 Stat. 1212.

46 U.S.C.A. page 545.

Section 1312. Scope of chapter; "United States"; "foreign trade".

This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: Provided, however, That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter: Provided further, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in

foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter. Apr. 16, 1936, c. 229 Section 13, 49 Stat. 1212; Proc. No. 2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352.
46 U.S.C.A. pages 545-546.

The pertinent provisions of the bills of lading involved are herewith set forth.

"7. The Carrier's responsibility in respect of the Goods as a Carrier shall not attach until the Goods are actually loaded for transportation upon the Vessel, and shall terminate, without notice, as soon as the Goods leave the Vessel's tackles at destination or other place where the Carrier is authorized to make delivery or end its responsibility. Any responsibility of the Carrier in respect of the Goods attaching prior to such loading or continuing after leaving the Vessel's tackles as aforesaid, whether the Goods are in course of lighterage by the Carrier or however else the same may be situated, shall be the same only as that of a Warehouseman, without liability on the part of the Carrier, except for want of ordinary care; and all conditions, exceptions and limitations of the liability of the Carrier, contained in this contract shall be deemed to apply also to such Warehouseman's liability as well as to liability as a Carrier. * * *

"30. In consideration of a choice of freight rates having been offered to the shipper by the Carrier, it is agreed that in case of loss of, or damage to * * * goods of an actual value exceeding $500 * * * per package or, in case of goods not shipped in packages, per customary freight unit, the value of such goods, shall be deemed to be $500 per package or per said unit and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per said unit and pro rata in case of partial loss or damage, unless the nature of such goods and a value higher than $500 per package or per said unit shall have been declared in writing by the shipper upon delivery to the Carrier and noted on the face hereof and unless payment of

the extra freight charge incident thereto shall have been made or promised * * *, in which case such declared value, or the actual value if less, shall be the basis for computing damages and any partial loss or damage shall be adjusted pro rata. * * *

"37. This bill of lading shall have effect subject to the Carriage of Goods by Sea Act of the U.S.A. and the carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act. To the extent that any term of this bill of lading is repugnant to or inconsistent with anything in such Act, it shall be void."

(Opinion, District Court, R. pp. 18-19).

QUESTION PRESENTED FOR REVIEW

Is a stevedoring company which has been employed by a vessel owner to load cargo on his vessel, a general ship, for carriage from a United States Port to a foreign port, entitled to the benefits of limited liability as provided for in the Carriage of Goods by Sea Act and the contracts of carriage entered into between the cargo owner and the vessel owner as evidenced by the bills of lading?

Secs. 1304(5) and 1307, 46 U.S.C.A. pp. 489-490, 543; Par. 30, Bills of lading R. pp. 18-19.

STATEMENT OF THE CASE

Pursuant to contracts, as evidenced by bills of lading, prepared by representatives of Krawill Machinery Corporation and Associates, Respondents herein, which were accepted by the Master and general agents of the SS CASTILLO AMPUDIA whereby the owners of the SS CASTILLO AMPUDIA agreed to carry certain packages or cases of machinery from Baltimore, Maryland, to Valencia, Spain, on their said vessel, the general agents of the vessel employed Petitioner, Robert C. Herd & Company, Inc.,

stevedores, to load the shipment (R. Stip. pp. 14-16) (Hatchel R. pp. 11-12) (Opinion, District Court, R. pp. 17, 19). The loading equipment of the vessel being too light to lift the cases, Petitioner employed a derrick from the Bethlehem Steel Company for that purpose and on April 14, 1954, while loading operations were in progress, one of the packages or cases slipped from the slings and landed in the water which caused damage to its contents (Carroll, R. p. 9); (Wilkinson, R. pp. 2-4); (Jenkins, R. pp. 6-8); (Opinion, District Court, R. pp. 17-20).

Instead of bringing suit against the vessel and/or her owner, Respondents filed an action at law in the United States District Court for the District of Maryland against Petitioner, the stevedore employed by the ship and her owner to load the cargo for their account and against Bethlehem Steel Company, the owner of the derrick. After trial without a jury, the District Court held Bethlehem Steel Company free of fault, Petitioner liable and denied Petitioner's right to benefit either from Section 1304(5) of the Carriage of Goods by Sea Act or from paragraph or Article 30 of the bills of lading in respect to limitation of liability (Opinion, R. p. 37). On appeal the Court of Appeals for the Fourth Circuit affirmed the decision of the District Court. Both the District Court and the Court of Appeals refused to follow the decision of the Court of Appeals for the Fifth Circuit in *A. M. Collins & Co. v. Panama Railroad Company*, 197 F. (2d) 893, 895, Certiorari denied 344 U.S. 875, 97 L. Ed. 677, as well as later similar decisions.

SUMMARY OF ARGUMENT

The Court of Appeals improperly held that because neither the Carriage of Goods by Sea Act nor the bills of lading involved herein mentioned stevedores, Petitioner

who was the agent of the carrier and performing the carrier's obligations in respect to loading as required by the Carriage of Goods By Sea Act and the contracts of carriage as evidenced by the bills of lading was not entitled to limit its liability as allowed by the terms of the Carriage of Goods By Sea Act and the contracts of carriage although the carrier himself could so limit.

ARGUMENT

First Point

THE LIMITATION OF LIABILITY ACCORDED THE CARRIER BY THE TERMS OF THE CARRIAGE OF GOODS BY SEA ACT AS WELL AS BY THE TERMS OF THE CONTRACTS OF CARRIAGE AS EVIDENCED BY THE BILLS OF LADING WAS NOT MEANT TO BE PERSONAL TO THE CARRIER.

The Carrier's non-delegable obligation to load and discharge the goods carried does not obligate him to load and discharge by means of his crew as in former times. There is nothing in the Carriage of Goods by Sea Act which so indicates. Furthermore, when the Act was passed, it must be that it was common knowledge that loading and discharging were carried on by expert stevedores. It must have been known also that under modern conditions the ship's crew could not possibly load, stow and discharge the goods carried. In *Seas Shipping Company v. Sieracki*, 66 S. Ct. 872, 328 U.S. 85, 90 L. Ed. 1099, this Court has recognized that a ship owner has the right to conduct his business by securing the advantages of specialization in labor and skill brought about by modern divisions of labor, such as employing stevedores (p. 100 of 328 U.S.). In this case, therefore, Petitioner was loading the packages in furtherance of the Carriage of Goods by Sea Act and the contracts of carriage, as evidenced by the bills of lading, as authorized by the Act and it should be allowed to benefit from the

Act and the bills of lading in respect to the carrier's limitation of liability. If it is not so allowed, Respondents, shippers of the damaged case or package will receive a windfall not authorized or contemplated by the Carriage of Goods by Sea Act or the bills of lading issued pursuant to that Act's authority.

In *A. M. Collins & Co. v. Panama Railroad Co., supra,* the Court of Appeals for the Fifth Circuit by a divided Court held that the Panama Railroad Company which was engaged by the carrier to discharge a freezer unit from his vessel and who negligently caused it to fall in the discharging operation was liable to the unit's owner for the damages which it sustained only to the extent of the limited liability provided for in the contract of carriage between the shipper and the ship owner as evidenced by the bill of lading involved. Among other things, Circuit Judge Rives speaking for the majority on pages 896 and 897 said:

> "The controlling feature of the case is not, as appellants contend, who are the formal parties to the bill of lading. What is controlling are the terms, purpose and effect of the bill of lading as applied to the facts. The unloading of the shipment was the obligation of the carrier. In the absence of a different agreement with persons not parties thereto, the terms of the bill of lading controlled all steps of the transportation, including, of course, the discharge of the shipment. The stevedore was not a meddler, nor did it inflict intentional harm. It was an agent selected by the carrier to carry out the carrier's obligation to safely deliver and discharge the cargo as required by its contract with the shipper. The negligent injury and damage arose in the course of this very performance of the carrier's obligation. This is well stated by the trial court. That the carrier would engage such services must have been contemplated by the parties. The situation is substantially the same as if the carrier had

shipped by another vessel, as authorized by the bill of lading. A stevedore so unloading, in every practical sense, does so by virtue of the bill of lading and, though not strictly speaking a party thereto, is, while liable as an agent for its own negligence, at the same time entitled to claim the limitation of liability provided by the bill of lading to the furtherance of the terms of which its operations are directed.

* * * * * *

"The limitation on liability of the carrier under the Carriage of Goods by Sea Act is not intended to be personal, but, unless otherwise agreed, extends to any agency by means of which the carrier performs its contract of transportation and delivery. As well stated in 2 Am. Law Inst., Restatement of Agency, Sec. 347; 'An agent who is acting in pursuance of his authority has such immunities of the principal as are not personal to the principal.' See also Herzog v. Mittleman, 155 Or. 624, 65 P. 2d 384, 109 A.L.R. 662, 666; 35 Am. Jur., Master & Servant, Sec. 584, p. 1020, note 11.

* * * * * *

"It would be unreasonable to assume that Congress intended that, in order to make the limitation of liability, provided in the Carriage of Goods by Sea Act applicable to the unloading of the goods, the carrier must do its own stevedoring. So to hold would be contrary to the broad purposes of meeting the need for uniformity in ocean bills of lading illustrated by the history of the Carriage of Goods by Sea Act as explained in Pan-Am. Trade & Credit Corp. v. The Campfire, 2 Cir., 156 F. 2d 603, 605 and The Bill, D.C., 55 F. Supp. 780, 783. On the contrary the interests of all concerned are best served by according the carrier the utmost liberty of choice of means by which its task may be performed most safely, economically, and efficiently. Experience teaches that in the unloading of the cargo that choice would usually fall upon a stevedoring company."

The *Collins* decision has been approved and followed in the following cases:

SOUTH STAR, 210 F. (2d) 44, 45;
Autobuses Modernos, S. A. v. Federal Mariner, etc., 125 F. Supp. 780 (E.D. Pa.);
Adriana Chutter v. KLM Royal Dutch Airlines, 132 F. Supp. 611 (S.D. N.Y.);
National Federation of Coffee Growers of Colombia against Isbrandtsen Company, Inc., 1957 A.M.C. 1571 (Supreme Court State of New York);
Ford Motor Company v. Jarka Corporation, 1954 A.M.C. 1095 (Municipal Court of New York City); 134 N.Y. Supp. (2d) 52;
Berger v. 34th Street Garage, Inc., 3 N.Y. (2d) 701, 148 N.E. 2d 883.

As far as we can learn, the only Court in the United States in addition to the District Court of Maryland and the Court of Appeals for the Fourth Circuit which has refused to follow the *Collins* decision is the District Court for the Eastern District of Michigan Southern Division. See *International Milling Company v. Steamship PERSEUS and Nicholson Transit Company*, 1958 A.M.C. 526.

In *Schoeffer v. United Parcel Service of N. Y.*, 277 App. Div. 569 (1st Dept. 1950), the plaintiff had stored her furs with one Morris and agreed that their value was $3,000.00. In December she ordered them delivered to her home and Morris employed the defendant to effectuate delivery. The defendant lost them and, when sued for the actual value ($12,000) asserted the right to limit its liability to the declared value of $3,000. The Court allowed the defendant the asserted right, saying on page 571:

> "Defendant was not an interloper; it was not a stranger to the contract of bailment; it was not a tortious third party; indeed it was engaged in performing the bailment agreement when the furs were

stolen. It has been urged with much force that for all practical purposes the defendant was Morris inasmuch as it had been properly selected to carry out an essential part of the bailment agreement."

In *Employers' Fire Ins. Co. v. United Parcel Service of Cincinnati, Inc.*, 89 Oh. App. 447, 99 N.E. (2d) 794 (1950), the Plaintiff had insured the owners of certain furs and apparently sued as one subrogated to their rights. The owners had asked Jenny, Inc., the shop which had sold the furs, to store them over the summer. The value was stipulated at $100. The shop requested defendant to call at the owner's residence and bring the furs to the shop. They sustained damage while in transit. It was held that the defendant could take advantage of the clause limiting the shop's liability to $100. The Court, after citing Agency Restatement, Section 347, said on page 456:

"Had the principal acted in person in carrying this coat and been sued for the damage done, no matter what the form of action, its liability would have been limited to $100. When it engaged the defendant to get the coat for it, it clothed defendant with all the authority and rights which it, the principal, had against the owner, including the right to have liability limited to $100. It was a defense pro tanto, available equally to Jenny, Inc., and any and all in possession of the coat under its authority."

In *Wilson v. Darling Island Stevedoring & Lighterage Co., Ltd.* (1956), Argus Law Reports 311, 1 Lloyd's Law List Reports, 346, decided February 29, 1956, it appears that goods imported into Australia were damaged by flooding. The bill of lading issued by the ship owner contained an exculpatory clause to this effect:

"The carrier has no responsibility whatever for the goods prior to the loading on and subsequent to the discharge from the vessel. * * *"

The shipowner employed the defendant stevedoring company to unload the goods at Sydney, and one of the company's employees operated a mobile crane with such want of care that it struck and broke a water pipe on the shed, thus soaking and ruining the plaintiff's imported goods. When the plaintiff sued the stevedoring company, the latter pleaded as a defense the exculpatory clause in the bill of lading. The Supreme Court of New South Wales held the defense good and dismissed the complaint. Upon the plaintiff's appeal to the High Court of Australia, that Court reversed three votes to two.

Judge Williams dissenting, regarded the case of *Elder, Dempster & Co. v. Paterson, Zochinis & Co.* (1924), App. Cas. 522, as laying down the correct principles. These, he said:

> "must surely be that the contract prescribes the conditions upon which the goods are placed in the possession of the carrier in order that he may perform the contract of carriage, that it is obvious that in order to perform that contract the carrier must employ servants, agents or independent contractors to carry out part of his duties, and that the true intent of the contract is that all persons engaged by the carrier to perform it should participate in the performance on the same basis as the carrier himself." (p. 353, 1 1 Lloyd's Law List Reports 1956).

Judge Taylor filed a separate dissenting opinion, following very much the same lines as the other dissenting Justice. He said:

> "It is elementary common knowledge that duties and obligations under many varieties of contracts frequently are, and indeed frequently must be, performed by the servants or agents of one or both contracting parties, and to assert that the legal duties of servants and agents who are employed for such a purpose must

be determined quite independently of the contract itself is to introduce a highly artificial standard". (p. 371, I Lloyd's Law List Reports 1956).

Both of the dissenting Justices cited with approval the *Collins* case and Judge Williams also relied upon *Ford Motor Company v. Jarka Corporation*, supra.

Second Point

AUTHORITIES RELIED UPON BY CHIEF JUDGE SOBELOFF OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT.

In holding that the limitation provisions in the Carriage of Goods by Sea Act and in the contracts of carriage as evidenced by the bills of lading were personal to the ship owner because stevedores were not mentioned in the act or the bills of lading, Judge Sobeloff relied upon the dissenting opinion of Circuit Judge Holmes in the *Collins* case and upon *Reid v. American Exp. Co.*, 241 U.S. 544, 36 S. Ct. 712, 60 L. Ed. 1156, and *Brady v. Roosevelt Steamship Company*, 317 U.S. 575, 580, 63 S. Ct. 425, 87 L. Ed. 471, referred to by Judge Holmes as well as upon the majority opinions in *Wilson v. Darling Island Stevedoring & Lighterage Co., Ltd.*, supra, and upon the case of *International Milling Company v. Steamship PERSEUS and Nicholson Transit Company*, supra.

In the *Reid* case the stevedore did not plead immunity or limitation of liability and Circuit Judge Rives who wrote the majority opinion in the *Collins* case dealt with it on page 896 in the following language.

> "The fact situation in Reid v. Fargo, as President of American Express Co., 241 U.S. 544, 36 S. Ct. 712, 60 L. Ed. 1156, was similar to that here involved, but the similarity does not extend to the principles controlling here. In that case, as may be clearly seen from the paragraph of the opinion ending on page 547 of 241

> U.S., at page 713 of 36 S. Ct., Hogan & Sons, the stevedores, did not undertake to set up the limitation of liability contained in the bill of lading. In that case the Court did not pass on whether the limitation was available to the stevedores because the stevedores did not even claim it. Further, that case was not governed by the Carriage of Goods by Sea Act nor by any other statute intended to meet the need for uniformity in ocean bills of lading."

Brady v. Roosevelt Steamship Co., supra, merely held that an agent who was operating a vessel for the Government could be held liable for his own negligence although the Government was immune from suit. We fail to see that this case affords any help when considering the proposition of whether or not a stevedore who is employed by a ship owner to do the things the ship owner is obligated or compelled to do by statute and a valid contract of carriage is entitled to the limitation of liability afforded the ship owner both by statute and the contract of carriage.

The majority opinions in *Wilson v. Darling Island Stevedoring & Lighterage Co., Ltd.,* supra, held that the stevedore not being a party to the contract of carriage as evidenced by the bill of lading could have no rights under it. Among other things, Judge Fullagar on page 364 of 1 Lloyd's Law List Reports 1956 said:

> "The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. * * *"

Judge Dixon concurred with the opinion of Judge Fullagar and Judge Kitto stressed the proposition that the limitation of liability clause in the bill of lading was by its terms personal to the ship owner (p. 348 and p. 364, 1 Lloyd's Law List Reports 1956).

The statement made by Judge Fullagar as above set forth is certainly not true as to the Petitioner in this case. Petitioner was not only performing the ship owner's work in conformity with the bills of lading, but it was he who actually signed them on behalf of the ship owner (Hachtel, R. p. 12).

In *International Milling Co. v. Steamship PERSEUS and Nicholson Transit Company*, supra, the Court citing Judge Thomsen's opinion and the dissenting opinion of Judge Holmes in the *Collins* case held that the immunities and limitations granted the carrier by the terms of the Carriage of Goods by Sea Act were personal to him and the Master of the carrying vessel, therefore, could gain no benefit from them.

Judge Sobeloff's suggestion that this case may be different from the *Collins* case because unlike *Collins*, there is evidence in this case that on the Eastern Seaboard stevedores base their charges on such factors as weight, difficulty of handling, etc., and do not, like the carrier, offer a choice of rates in which the declared value of the cargo and the amount of possible liability is considered in fixing their charges hardly merits serious consideration (R. p. 54). Neither in the *Collins* case nor in any of the other cases which are being reviewed were the stevedores' charges considered. Nothing was said in reference to them. Furthermore, in holding that the stevedore was acting under the Bill of Lading in the *Collins* case Circuit Judge Rives, on page 896 of 197 F. (2d) said:

> "It (stevedore) was an agent selected by the carrier to carry out the carrier's obligation to safely deliver and discharge the cargo as required by its contract with the shipper. * * * That the carrier would engage such services must have been contemplated by the parties. * * * A stevedore so unloading, in every

practical sense, does so by virtue of the bill of lading and, though not strictly speaking a party thereto, is, while liable as an agent for its own negligence, at the same time entitled to claim the limitation of liability provided by the bill of lading to the furtherance of the terms of which its operations are directed."

Third Point

THIS COURT HAS HELD THAT ONE MAY BENEFIT FROM A STATUTE ALTHOUGH HE HAS NOT BEEN INCLUDED THEREIN AS A BENEFICIARY.

In *International Stevedoring Company v. R. Haverty*, 47 S. Ct. 19, 272 U.S. 50, 71 L. Ed. 157 and in *Seas Shipping Company v. Sieracki*, supra, this Court held that although the Seamen's Act commonly known as the Jones Act (46 U.S.C.A. Section 688, p. 23; Sec. 20, 38 Stat. 1185) refers only to seamen, stevedores should be given the benefits of the Act because they were doing seamen's work or work which seamen formerly did. And in the *Sieracki* case, supra, on page 100 of 328 U.S. this Court said:

> "As we have said, he (ship owner) is at liberty to conduct his business by securing the advantages of specialization in labor and skill brought about by modern divisions of labor."

If an individual stevedore is entitled to benefits under a statute which is stated to apply to seamen because stevedores do the work formerly done by seamen, it would seem that consistency should require the granting to a stevedoring company the same limitation of liability which a statute accords an ocean carrier when the stevedoring company is doing the work not only formerly done by seamen but impossible to do so by the carrier's crew under modern conditions and which the statute obligates the carrier to do, particularly so when it is admitted that a

vessel owner has the right to conduct his business by securing the advantages of specialization in labor or skill brought about by modern divisions of labor.

Last Point

JUDGE THOMSEN'S DIFFERENTIATION OF LOADING AND PREPARING TO LOAD.

While Judge Thomsen accepted the "tackle to tackle" test, he held that when the case fell from the sling, the stevedores were preparing to load in distinction from loading (R. p. 29). The Court of Appeals held that it was unnecessary to consider that matter (R. p. 58). However, we respectfully submit that Judge Thomsen was in error.

The case was placed in the slings attached to the derrick by the stevedores. It fell out of the slings while it was being lifted pursuant to instructions from the stevedores as a part of the loading operation (Wilkenson, R. p. 4; Jenkins, R. pp. 5-7). We respectfully submit, therefore, that the distinction made by the District Judge between loading and preparing to load was not justified.

CONCLUSION

For the foregoing reasons Petitioner respectfully submits that the judgment of the Court of Appeals for the Fourth Circuit should be reversed and Petitioner's liability to Respondents should be limited to the sum of $500.00.

Respectfully submitted,

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No. 276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

ROBERT C. HERD & COMPANY, INC.
Petitioner,

v.

KRAWILL MACHINERY CORPORATION, KRAUS MANUFACTURING CORPORATION, and ENGINEERING INDUSTRIES INTERNATIONAL, S. A.,
Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF *AMICUS CURIAE*, THE NATIONAL ASSOCIATION OF STEVEDORES, FILED IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE*, THE NATIONAL ASSOCIATION OF STEVEDORES, FILED IN SUPPORT OF PETITIONER

Opinions Below

The opinion of the District Court for the District of Maryland determining the questions now before this Court is reported at 145 F. Supp. 554. Its subsequent opinion determining the quantum of damages is reported at 155 F. Supp. 296. The opinion of the Court of Appeals for the Fourth Circuit is reported at 256 F. 2d 946.

Questions Presented

A stevedore employed by a carrier to load a vessel dropped a shipper's cargo. The shipper sued the stevedore.

1. Is the stevedore as to that shipper entitled to the protection of the limitation of liability provision contained in the contract of carriage between the shipper and the carrier when the stevedore was performing the carrier's contractual obligations?

2. Is the stevedore as to that shipper entitled to the protection of the limitation of liability provision contained in the Carriage of Goods by Sea Act (assuming it to be applicable) when the stevedore was performing the carrier's statutory obligations?

3. Under the facts in this case, did the loss occur during a period governed by the Carriage of Goods by Sea Act?

Contract and Statute Involved

These have been set forth in petitioner's brief. The contract is the contract of carriage between the shipper and the carrier. The statute involved is the Carriage of Goods by Sea Act, commonly called Cogsa. (An Act Relating to the Carriage of Goods by Sea Apr. 16, 1936, c. 229, 49 Stat. 1207, 46 U.S.C.A. §§ 1300-1315.)

Interest of the *Amicus Curiae**

The National Association of Stevedores is an association of 111 companies in the United States and Hawaii

* All parties to the case have consented to the filing of this brief. See Rule 42(2), Supreme Court of the United States Revised Rules (1954).

which perform stevedoring services in connection with this nation's commerce by water. Its home office is in New York. It has regional offices in Baltimore, Charleston, Cleveland, Honolulu, Mobile and Seattle. Its officers or directors have offices in most of these cities and, in addition, have offices in Boston, Corpus Christi, Portland, San Francisco and Toledo. Most, if not all, of the major stevedoring companies in the United States and Hawaii are members.

Of the approximately 150,000 men employed as longshoremen in the United States, between 70-80% are employed by the Association's members. Its members likewise handle in excess of 70% of the tonnage lifted in this country.

The annual cost of stevedoring in the United States is approximately $1,200 million. The Association's members account for approximately 75% of this figure, or $900 million.

The Association's economic interest is quite simple: Between 15-20% of the tonnage lifted in this country is by steamship companies who perform their own stevedoring. While this competition has in the past been keen (stevedoring is everywhere highly competitive in this country), success in the business has in the main turned upon the quality of the service rendered.

The decision below, if allowed to stand, permits steamship companies who do their own stevedoring to limit their liability against claims and suits brought on behalf of cargo interests in accordance with the $500 per package provision of the Carriage of Goods by Sea Act, while contract stevedores performing the

identical service may not. Not only does the decision discriminate against the contract stevedore, but it will result in a discrimination against the Association members' customers, those steamship companies whose size or activities do not justify operating their own stevedoring departments and who must, because of the small margin of profit in the stevedoring business, be called upon to share the cost of this increased risk.

Statement

This action was brought by Krawill Machinery Corporation, a shipper, against a stevedore, Robert C. Herd & Co., and also against the owner of a floating crane, Bethlehem Steel Company, to recover for damage to an out-sized 19 ton press which toppled into the water in its case while being loaded, or being prepared to be loaded, from a railroad flat car at Baltimore into the hold of the steamship CASTILLO AMPUDIA. The District Court found Herd, the stevedore, guilty of negligence and dismissed the complaint as against Bethlehem.

It was stipulated that Herd, who was both the local agent and stevedore for the carrier, had no written contract with the vessel or the carrier and that his charges were predicated upon weight, density, difficulty of handling and other factors affecting the costs of doing the stevedoring work, but not on any declared value of the cargo (R. 15).

Custody of the shipment was released by the railroad to the vessel (R. 10, 14) and the flat car on which the press was carried was placed on the pier alongside of the steamship CASTILLO AMPUDIA. Herd, representing the ship in Baltimore, signed the bills of lading

(R. 12), which had been prepared by the shipper's freight forwarder (R. 15).

Since the case was too heavy for the ship's gear, a heavy-lift floating derrick, owned and operated by Bethlehem, was ordered and tied up on the offshore side of the vessel. The crane operator swung the boom of the crane across the deck of the ship so that the hook hung over the flat car.

Wilkerson, a gang leader employed by Herd, was in charge of the loading operation. Because the regular wire slings were too thick to fit under the case, he decided to use the crane and a thinner wire to lift the inshore side of the case a short distance, so that a chock could be placed under the tilted case and the regular sling inserted (R. 2)—a not unusual operation with heavy-lift cargo (R. 20).

But the case, which was 8′ x 5′ x 11′, had been tendered with its long axis upright. In addition, the press, which had a heavy base plate, was upside down in the case, which was consequently top-heavy.

When the wire was in place under one side of the case, Wilkerson gave the signal from the pier for the short lift to a Herd employee on the deck of the ship, who relayed it to the crane operator. As the case was tilted, its center of gravity shifted and the case toppled into the water.

The District Court found that Wilkerson was negligent in waiting too long to give the "stop" signal and in failing to make allowance for the normal reaction time of the deckman and the crane operator, and found Herd, his employer, liable.

Herd, relying upon the line of decisions of which *A. M. Collins & Co.* v. *Panama R. Co.*, 197 F. 2d 893 (5 Cir. 1952), cert. den. 344 U. S. 875, is nearest on the facts, pleaded as a partial defense that its liability was limited by the $500 per package limitation contained in its principal's bill of lading which Herd had signed for the vessel and which was issued to Krawill, and that its liability was also limited by the parallel limitation contained in the Carriage of Goods by Sea Act.

The District Court held (1) that the stevedore, who was not named in the bill of lading, was not entitled to its limitations (R. 31); (2) that Cogsa did not extend to the stevedore the $500 limitation of liability contained in Sec. 4(5) (R. 37); and (3) that the damage occurred, not during loading, but during a stage preliminary to loading and therefore not within the period covered by Cogsa Sec. 1(e) (R. 29). It subsequently entered judgment for $47,992.04 but declined to allow interest for the period prior to judgment (R. 45).

The Court of Appeals for the Fourth Circuit affirmed the award on the first two grounds (R. 62) and found it unnecessary to consider the third ground (R. 58). It remanded the judgment, however, for clarification and further consideration of the question of interest (R. 62).

It is our position that the courts below were in error.

Summary of Argument

Under the sound general principle that one appointed to discharge the duties of another is not bound

to discharge a greater obligation than is owed by the one whose duties he is performing, the stevedore here, who was employed to perform the carrier's duties under (a) the contract of carriage and (b) under the Carriage of Goods by Sea Act, need answer to no greater liability than would the carrier. The shipper's rights are not enhanced merely because a particular carrier does not do the stevedoring himself. The stevedore is entitled to the benefit of the provision limiting liability to $500 in both the contract of carriage and the Carriage of Goods by Sea Act.

The decision below discriminates against contract stevedores and in favor of house stevedores and, because stevedoring charges are part of the carrier's overhead, accordingly discriminates against steamship companies not equipped to perform their own stevedoring in favor of those which are so equipped. This result is not only arbitrary but thwarts the fundamental purpose of the Carriage of Goods by Sea Act to achieve and maintain uniform handling of problems arising out of ocean carriage of goods.

The decision gives cargo underwriters in subrogation cases a windfall contemplated neither by the cargo underwriters themselves nor by any other interest involved, in a heretofore stabilized area where a balance of economic interests has been reached in a legislative bargain made at the Brussels Convention, 1924 and adopted in our Carriage of Goods by Sea Act — a bargain which is reflected, on one hand, in the current freight rates and, on the other, in the cost of cargo insurance.

POINT I

A stevedore receives goods as an incident of a carrier's performance of his contract with a shipper, and is not liable, when the goods are lost, to any greater extent than the carrier would have been had the loss been caused by it.

The Court erred in holding that the stevedore was not entitled to the benefit of the limitation of liability contained in the bill of lading.

The principle which governs this appeal is this: When a party appoints another to discharge for him a particular obligation or duty which he owes to a third party, the person so appointed is not bound to discharge a greater obligation or duty than that owed by the obligor whose duty he is performing; and the third party who may command the performance can claim no greater or increased rights than those to which he would have been entitled, had the obligor himself discharged his duties.

Thus a stevedore employed by a steamship carrier to perform a contract made by it with a shipper of cargo is entitled to the same protection as the carrier would have, and need answer to no greater liability than would the carrier if the action were brought rather against it for breach of its contract. The shipper's rights are not enhanced merely because the carrier cannot or does not do the work itself. *A. M. Collins & Co.* v. *Panama R. Co.*, 197 F. 2d 893 (5 Cir. 1952).

It misses the point to say that the stevedore was not named in the contract. Having regard to the nature of the services contracted for by the shipper and the

corporate character of the carrier, the inference is inescapable that both parties contemplated that the carrier would perform its obligations through servants or other persons engaged for the purpose, and that the stevedoring would, in all likelihood, be performed through the agency of stevedores.

A.

Assuming no tortious act by the stevedore occurring *independently* of the performance of the contract, the rights of the shipper are the same whether the carrier did its own stevedoring or provided another to do it for him. *Elder, Dempster & Co., Ltd. and others* v. *Paterson, Zochonis & Co., Ltd.*, [1924] A. C. 522; (1924) 18 Ll. L. Rep. 319, is one of the leading English decisions recognizing that a person not formally a party to a contract may, nevertheless, under such circumstances, take advantage of its provisions.

There, goods were damaged by bad stowage while on board a vessel. The bills of lading excluded liability for damage from bad stowage, but only the charterers and shippers were parties to it. The shippers' contention that the owners of the ship were not protected because they were not parties to the contract was unanimously rejected by the House of Lords (Viscount Cave, Lord Dunedin, Lord Sumner and Lord Carson; Viscount Finlay agreeing on this point but dissenting on other grounds).

Viscount Cave said:

"It may be that the owners were not directly parties to the contract; but they took possession of the goods (as Scrutton, L. J. says) on behalf of and as the agents of the charterers, and so can

claim the same protection as their principals." Id., [1924] A. C. 522, 534; (1924) 18 Ll. L. Rep. 319, 321.

The reference by Viscount Cave to Scrutton, L. J. was to the latter's dissent in the Court of Appeal ([1923] 1 K. B. 420, 441-442, (1922) 13 Ll. L. Rep. 513, 517) where he said:

> "But it was argued that the fourth defendant, the owner, was liable in tort because he was not a party to the bill of lading and therefore could not claim the benefit of the exceptions contained in it, but was a bailee liable for negligence — i.e., bad stowage. . . . The real answer to the claim is in my view that the shipowner is not in possession as a bailee, but as the agent of a person, the charterer, with whom the owner of the goods has made a contract defining his liability, and that the owner as servant or agent of the charterer can claim the same protection as the charterer."

Discussing the same question (whether or not the owners were entitled to the benefit of the bill of lading limitation) Viscount Finlay said (at pp. 548 and 326 of the respective reports):

> "If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued."

Speaking later of the rule in *Elder, Dempster*, Scrutton, L. J. in *Mersey Shipping & Transport Com-*

pany, Ltd., v. *Rea, Ltd.*, (1925) 21 Ll.L. Rep. 375, 378, explained:

> "I think that the reasoning of the House of Lords in the *Elder, Dempster case, sup.*, shows that, where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, but they can claim the protection of the contract made with their employers on whose behalf they are acting. I think that is the result of the second point in the judgments of Lord Cave and of Lord Sumner, with whom Lord Dunedin concurs, in the *Elder, Dempster case, sup.*"*

B.

A number of American cases, several of them following *Collins*, have applied the same fundamental principle under a variety of circumstances:

In *United States* v. *The South Star*, 210 F. 2d 44, 45 (2 Cir. 1954), an agent and a stevedore, to whom the carrier's duty of stowage had been delegated, were each given the benefit of the time limitation provisions of the carrier's charter. Accord: *L. W. & P. Armstrong* v. *The Mormacmar*, 196 F. 2d 752, 755 (2 Cir. 1952), concurring opinion of Judge Learned Hand who said that his views concerning the applicability of the suit clause were shared by the other judges sitting.

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* A recent Australian decision relied upon by the court below, *Wilson* v. *Darling Island Stevedoring & Lighterage Co. Ltd.*, [1956] 1 Lloyd's Rep. 346, decided three votes to two, attempts to distinguish *Elder, Dempster*, but as the dissenting speeches of Williams, J. and Taylor J. point out, the Australian case represents a retreat from the tendency of the English decisions. *Id.*, at 353.

Autobuses Modernos, S. A. v. *The Federal Mariner*, 125 F. Supp. 780, 783 (E. D. Pa. 1954), followed *Collins* and held the stevedore entitled to the protection of the limitation of liability provision of the carrier's bill of lading.

In addition, the state courts have reached the same result under various different fact situations. The cases—too numerous and diverse to discuss here—have been digested and are collected in a short appendix to this brief.

It is much too facile and a gross oversimplification of the problem presented here merely to generalize abstractly concerning the responsibility of a tortfeasor for his own wrongdoing. As demonstrated above, the cases are legion wherein the courts have recognized the complexity of the problem and have delineated between defendants entitled to the shelter of limitation and those who are not, according to the relationships of the parties involved.

The following considerations are determinative:

Is the defendant an unforeseen stranger who has intruded into a relationship and committed tortious acts neither within the purview of either party's duty nor related to the performance of either party's contractual obligations? Did the defendant commit acts utterly independent of the performance of the contract of the parties? Can it be said that the risk of harm from his conduct was neither contemplated nor considered by the parties nor reflected in their agreement?

Or, is the defendant a usual instrumentality legitimately engaged in performing work for the purpose

of carrying out a delegated obligation which was required by one and agreed to be assumed by the other of the parties to the transaction, and whose error occurs in the course of that very performance?

Surely the role of the defendent in the instant case is so inherently enmeshed with that of the carrier and so much a part of the work contemplated by the contracting parties as to fit even the most stringent of the criteria yet laid down by the courts in cases of this nature.

C.

In the court below, Krawill argued that Herd was neither a donee beneficiary, a creditor beneficiary nor an incidental beneficiary and therefore not entitled to the protection of the bill of lading. See Restatement of the Law of Contracts, Section 133.

But cases urged to support this are instances of third persons seeking affirmative recovery under contracts to which they were not parties and where they were not contemplated by the contracting parties. No affirmative recovery under the contract is sought here. The petitioner here is merely contending that the respondent should get what it bargained for when becoming a party to the contract. Its principal position is not only entirely consistent with that cited by respondent, but rests upon the same proposition, namely that the consequences flowing from performance or non-performance of the contract must be reasonably within the contemplation of the contracting parties. In other words, in the event of non-performance the parties should get neither more nor less than what they bargained for.

In the present situation the respondent agreed that in the event of loss or damage to the cargo being carried under the contract, the amount of his recovery would be limited to $500. The fact that under the particular circumstances of this case certain carrier services were performed by persons other than the carrier company but with the same object, purpose and result and in accordance with usual and customary present-day procedures, should not of itself add to the contemplated rights of the respondent-shipper or remove disabilities which it had voluntarily assumed.

D.

The common thread of the decisions above and in the appendix is that an agent acting within the scope of its employment, and performing services commonly and customarily performed by the principal, by virtue of its status as such, is entitled to such contractual or statutory limitations or immunities as would be available to its principal. If the acts in question had been performed by the principal rather than through the medium of the agent, the respective claims would either be lost or limited. If the acts happened to be performed by an agent, the rights under a contract, or otherwise legally envisaged, should be the same and the plaintiffs in the respective cases should not be entitled to a windfall simply because of this circumstance.

That is the situation here.

The court below erred in holding that the stevedore was not entitled to the benefit of the limitation of liability contained in the bill of lading.

POINT II

A stevedore performing the statutory duties of a carrier imposed by the Carriage of Goods by Sea Act is not liable, when the goods are lost, to any greater extent than the carrier would have been had the loss been caused by it.

The Court erred in holding that the stevedore was not entitled to the benefit of the limitation of liability contained in that Act.

A.

Under the preceding point, we demonstrated that one who has been appointed to discharge the duty of another is, while acting in pursuance of his authority, entitled to the same liability limitations and immunities as is the party whose duty is being performed. The cases discussed there and in the appendix make clear that this principle applies, not only to contractual rights and obligations, but also to rights and obligations laid down by statute.

Therefore, by the same reasoning, the stevedore is entitled to have his liability limited in accordance with the $500 per package limitation contained in the Carriage of Goods by Sea Act, 46 U. S. C. A. 1304(5).

This statutory limitation is not, as the *Collins* case explained [197 F. 2d 893 at 897], within the group of *personal* immunities which cannot be delegated.

Personal immunities are properly limited to governmental immunities, the immunities protecting certain family relationships, and those given charities, public officers, infants, insane persons, and possibly one or two others. They were established at common law to pro-

tect interests of supposed social importance [see Prosser, *The Law of Torts*, 770 *et seq.* (2d ed., 1955)] or to prevent litigation thought to be prejudicial. [*Richards* v. *Parks*, 19 Tenn. App. 615, 93 S. W. 2d 639 (1935)]. These immunities are not extended to the holder's agents or servants, since to do so could in no respect protect or advance the policies underlying the immunities.

Therefore, decisions such as *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575 (1943) cited in the court below, and *United Fruit Co.* v. *United States*, 33 F. 2d 664 (5 Cir. 1929), which deal with the governmental immunity quite properly do not extend it to the agent. See also *Richards* v. *Parks*, 19 Tenn. App. 615, 93 S. W. 2d 639 (1935) immunity of parent to suit by child not available to parent's employee; *Shirkey* v. *Keokuk County*, 225 Iowa 1159, 281 N. W. 8373 (1938), immunity of a county; *Cowan* v. *Eastern Racing Association*, 330 Mass. 135, 111 N. E. 2d 752, 758 (1952), immunity of a charitable association.

But immunities from or qualifications upon liabilities or duties based simply upon property are deemed non-personal. Notes, 50 Harv. L. Rev. 1324 (1937); 27 Minn. L. Rev. 579 (1943). It is with such interests that the Act deals.

B.

Plainly, if the policies of the Act are to be advanced, its immunities must be extended to those through whom the carrier acts. Mr. Knauth in his original foreword to his work on "Ocean Bills of Lading" (1953) at page v. says:

> "The Convention of 1924 and the Act represent a broad business adjustment of the risks of ocean transportation."

If there is any one thing that the historical background of the Act indicates, it is that the Act was to govern all rights of the shipper in respect of the transportation of goods. The Act shows an intent that such uniform conditions shall apply "from the time when the goods are loaded on to the time when they are discharged from the ship" (46 U. S. C., Sec. 1302(e)).

This purpose would be defeated if there were one measure of liability for suits against the carrier, but quite a different measure of liability where the carrier had hired an employee or agent or independent contractor to load or unload the cargo instead of doing it personally.

For the word "carrier" is really a shorthand word for a well-known business complex embracing a number of operations including the one at hand. Obviously a carrier must ordinarily act through servants, agents and independent contractors. It would be a rare case where the carrier personally did all the acts involved in the transportation of goods. This was undoubtedly in the minds of those who framed the Act. Nothing in the Act indicates that the legislators contemplated that a different legal situation would arise dependent on whether the carrier or carrier's agent were sued.

It is the *subject matter of transportation* which is the criterion of the applicability of the Act and this expressly includes stowage. The Act itself makes it abundantly clear that the carrier's duties extend to and cover loading and stowage. Section 2 of that Act, 46 U. S. C. 1302, provides as follows:

> "Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, hand-

ling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1304 and 1305 of this title."

Likewise Section 3(2) of that Act, 46 U. S. C. 1303(2), provides:

"The carrier shall properly and carefully load, handle, stow, keep, care for and discharge the goods carried."

Thus both under the law and under the contract it was the carrier's obligation to see that the loading services were properly performed. The carrier could perform such services itself, or it could engage outside agencies to do them on its behalf, but by so doing the carrier was only performing its own obligations. Its obligations to the respondent in these respects were not delegable and the fact that such services were in whole or in part performed by agents would in no respect excuse the carrier from liability. *The Zulia* 235 Fed. 433*; *Heyn and others* v. *Ocean Steamship Company, Ltd.* (1927), 43 T. L. R. 358; 17 Asp. M. C. 228. Thus the provisions of the law (and the contract) enable the parties interested in the cargo to look directly to the carrier for indemnity for loss or damage to the goods irrespective of who did the actual work in loading or stowing them.

Apart from any statutory or contractual provisions, it is a carrier's basic common law duty to load and

* "The loading of the cargo is a duty which the shipowner is bound to perform as part of the contract of carriage. Consequently, it is wholly immaterial to the shipper whether the shipowner performs this duty through its own general employes or through an independent contractor. The shipper's contract is with the shipowner; so far as he is concerned the stevedore is the servant of the ship." Veeder, J. in *The Zulia*, 235 Fed. 433, 437 (E.D.N.Y. 1916).

stow the ship. This fundamental part of the carrier service, performed by the ship's crew itself, or more frequently in recent times by specialized shore side workers was discussed by Mr. Justice Hughes in *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52. It was there said (p. 61):

> "We entertain no doubt that the service in loading and stowing a ship's cargo is of this [maritime] character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.'"

The stevedores are performing an integral and vital—as well as expensive*—portion of the basic contract of carriage and in any successful business operation their duties, responsibilities and liabilities must be directly related to it. Their compensation, among other things, is calculated upon the risks they may be called upon to bear, and to the extent that such risks are increased so must be the charges for their services and indirectly the rates which shippers are called upon to pay. Indeed in many instances the carrier company would, by contract or by operation of law, be required

* L. A. Lapham, president of the Marine Association of the Port of New York, speaking to the American Institute of Marine Underwriters of the costs of operation of two of his own liner services, reported that out of the average rate per revenue ton of $24.75, cargo handling expense accounts for $9.74, or nearly 55%. *Maritime Exchange Bulletin*, Vol. XLV, November, 1957, p. 6.

to indemnify the stevedores so that the liability would in effect be that of the carrier company itself.

The fact that such employees are not on the carrier's own payroll does not affect their status or the nature of their employment. *Puget Sound Co.* v. *Tax Commission,* 302 U. S. 90; *International Stevedoring Company* v. *Haverty,* (1926) 272 U. S. 50, 52; *Seas Shipping Co.* v. *Sieracki,* (1945) 328 U. S. 85, 100; *The Senator,* 21 Fed. 191.

In *Puget Sound Co.* v. *Tax Commission,* 302 U. S. 90, Mr. Justice Cardozo, in speaking of the status of stevedores loading and stowing vessels, said (p. 94):

> "What is decisive is the nature of the act, not the person of the actor. An independent contractor undertaking to navigate a vessel would have the same protection as a pilot agreeing to navigate it himself."

These remarks are applicable and pertinent here. The acts of Herd were carrier acts and the statutory and contractual protection available to the carrier should likewise be available to Herd as one doing the carrier's work.

POINT III

The decision below discriminates against contract stevedores and against steamship companies who do not do their own stevedoring, and disrupts the freight rate basis and insurance premium basis with no real advantage or ultimate gain.

The effect of the decision below is pernicious. It is not simply that it provides the shipper or his subrogated insurer with a windfall. It permits the few

major steamship lines who do their own stevedoring* through stevedoring departments to restrict their liability to cargo to the $500 per package limitation of the Carriage of Goods by Sea Act, while contract stevedores, competing with these stevedoring departments and performing the identical service, may not.

It is no answer that the contract stevedore need only pass these costs on to his steamship company employer for ultimate distribution of the losses among the members of the shipping community. See *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 96. Without doubt this will happen—it must—but with a resulting discrimination against the many steamship companies whose size or activities do not justify operating their own stevedoring departments.

The *Collins* case pointed this up when it said: "It would be unreasonable to assume that Congress intended that, in order to make the limitation of liability provided in the Carriage of Goods by Sea Act applicable to the unloading of the goods, the carrier must do its own stevedoring." [197 F. 2d 893 at 897] The fortuitous circumstance that the work is done by a contract stevedore rather than a house stevedore should not determine rights under the Act.

The commercial interests which are involved here have all been adjusted each to the other. That adjustment has been made in international commerce—made against the framework of the Carriage of Goods by Sea Act and is presently reflected in the level of freight rates on the one hand and the level of cargo insurance premiums on the other.

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* Between 15-20% of the tonnage in this country is lifted by carriers who perform their own stevedoring.

The shipper pays an established freight rate set by the carrier to cover its profit and operating costs, and its liability as limited by Cogsa. To complete his protection the shipper buys insurance from his cargo underwriter, paying established premiums. Since the carrier's liability under Cogsa cannot be diminished, the cargo underwriter knows the extent of his own risk and can maintain the appropriate premiums.

The considerations underlying this Court's decision in *Consumers Co.* v. *Kabushiki Kaisha*, 320 U. S. 249 (1943) are equally controlling here. There (speaking of the Fire Statute) the Court explained that—

> "Congress had simply severed the insurance features from the carriage features of sea transport and left the shipper to buy each separately. While it does not often come to the surface of the record in admiralty proceedings, we are not unaware that in commercial practice the shipper who buys carriage from the shipowner usually buys fire protection from an insurance company, thus obtaining in two contracts what once might have been embodied in one."

The Court concluded:

> "The purpose of the statute to relieve carriage rates of the insurance burden would be largely defeated if we were to adopt an interpretation which would enable cargo claimants and their subrogees to shift to the ship the risk of which Congress relieved the owner. This would restore the insurance burden at least in large part to the cost of carriage and hamper the competitive opportunity it was purposed to foster by putting our law on an equal basis with that of England." (pp. 255-256).

Stevedoring is part of the carrier's cost of operation. The stevedore, even if he does not have (as in the instant case) a formal indemnification agreement with the carrier, must necessarily collect the cost of his liability from his principal—if necessary, in the form of increased charges.

The rule below will permit the cargo underwriter to recover more from the carrier than its shipper-assured himself bargained for in his own agreement with the carrier and more than the underwriter had any reason to expect to recover when it insured the goods and collected its premium from the shipper.

The eventual result is to upset the existing cost bases in the industry and to require a readjustment of freight rates to reflect the indirect deletion from the Carriage of Goods by Sea Act of the $500 package limitation bargained for at Brussels in 1924 and promised by Congress in 1936—with no ultimate gain or advantage to any interest. Whether the cargo underwriter's premiums would be lowered to reflect the increased freight and redistribution of risk is problematical, but unless or until it is done, the shipping public is the loser.

POINT IV

The District Court erred in holding that the period of the application of the Carriage of Goods by Sea Act had not commenced.

The District Court found that "[t]he damage did not occur while the goods were being lifted onto the ship, but during a preliminary stage of the loading operation prior to *the actual lift*" (emphasis supplied)

and held, therefore, that the damage did not occur during the Cogsa period (R. 29).

This period the Court found defined in Section 1(e) of the Act:

> "The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship." [46 U.S.C.A. 1301(e)].

Explaining the English equivalent of this subsection, Carver's Carriage of Goods by Sea (10th ed. 1957) says (pp. 179-180):

> "It is clear from Art. II, Art. III, r. 2, and Art VII that the Rules apply *during* loading and discharge, although Art. I(*e*) is not clear on the matter."

Similarly, Scrutton on Charterparties (16th ed. 1955) says [at p. 470]:

> "The function of this sub-rule is to assist in the definition of the contract of carriage by identifying the first and last operations of those which together constitute the carriage of goods by sea. The words *'loaded on'* do not mean that the rights and liabilities referred to in Art. II apply only to that part of the operation of loading that takes place after the goods cross the ship's rail. Similarly goods are not *'discharged'* before they have been put into a lighter alongside. It is clear from Art. III, Rules 1 and 3, that the carrier may have obligations before the operation of loading begins." [footnotes omitted].

Section 2, the crucial section of the Act, provides, for example, that "the carrier in relation to the loading, handling, stowage * * * of such goods, shall be

subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth." [46 U.S.C.A. 1302]. Section 3(2) similarly states that "[t]he carrier shall properly and carefully load * * * the goods carried." [46 U.S.C.A. 1303(2)].

Thus, the application of the Act begins with the loading operation.

It will be recalled that the railroad car had been rolled out on the pier, the case inspected and a derrick ordered and brought alongside the ship (R. 19), the job surveyed by the crane operator and the gang leader, and the derrick's gear centered over and lowered to the case (R. 20). It is the steps that occurred thereafter with which we are concerned.

The question for decision is: Realistically and practically viewed, had the stevedores begun the loading operation?

The distinction drawn by the trial court would suggest that loading consists only of the actual *lift*. As loading is defined for insurance coverage purposes, this view has generally been rejected. See *Wagman* v. *American Fidelity & Cas. Co.*, 304 N. Y. 490, 494, 109 N. E. 2d 592 (1952), (loading of vehicle*). Certainly, there ought not be one test for underwriter liability purposes and a different one to govern the liability of the assured.

The artificial segmentation of the loading operation by the trial court was not in accord with the industry's practice, and the court was in error in concluding that loading had not commenced.

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* The *Wagman* case involves insurance, not on a vessel, but rather on a vehicle. We know of no closer case.

CONCLUSION

The petitioner's liability under Cogsa should be limited to $500. However, if Cogsa is inapplicable, the petitioner's liability is limited to $500 under the bill of lading.

For the foregoing reasons the order of the Court of Appeals for the Fourth Circuit should be reversed with directions that an order be entered limiting petitioner's liability to respondent to the sum of $500.

Dated: November 26, 1958.

Respectfully submitted,

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APPENDIX

Berger v. *34th Street Garage*, 3 N. Y. 2d 701, 148 N. E. 2d. 883 (1958), garageman to whom goods were entrusted by trucker entitled to benefit of limitation of liability provision of trucker's contract with cargo owners.

Maghee v. *The Camden & Amboy R. R. Co.*, 45 N. Y. 514, 520-521; 6 Am. Rep. 124 (1871), on-carrier selected to perform part of initial carrier's contract of carriage, entitled to the benefit of the limitations upon liability contained therein although not a party thereto.

Schoeffer v. *United Parcel Service of N. Y.*, 277 App. Div. 569, 571, 101 N. Y. S. 2d 451 (1st Dept. 1950), trucker who performed the delivery service promised in fur storage company's contract with owner entitled to the benefit of limitation of liability provision contained therein. Accord: *Employers Fire Insurance Co.* v. *United Parcel Service*, 89 Ohio App. 477, 99 N. E. 2d 794 (1950).

Ivy H. Smith v. *Warffemius*, 201 Md. 367, 93 A 2d 764 (1953), electric company secured an easement from plaintiff landowner for a proposed right of way and hired defendant contractor to clear it; in an action for trespass, the contractor as an agent of the electric company was not liable for cutting the timber permitted to be cut by the electric company's easement.

Wilder v. *Pennsylvania R. Co.*, 245 N. Y. 36, 156 N. E. 88, 52 A. L. R. 188, exemption from liability for injury in railroad company pass inures to the benefit of railroad terminal operator. Accord: *Hall* v. *North Eastern R. Co.*, [1875] L. R. 10 Q. B. 437; *Bicknell* v. *Grand Trunk R. Co.*, 26 Ontario App. Rep. 431 (1899);

but cf. *Parker* v. *Bissonette*, 203 S. C. 155, 26 S. E. 2d 497 (1943).

Herzog v. *Mittleman*, 155 Or. 624, 65 P. 2d 384 (1937), employee of automobile owner entitled to benefit of statute limiting owner's liability for injuries to guest to those caused by his gross negligence. To the same effect under a *common law* rule is *Richards* v. *Parks*, 19 Tenn. App. 615, 93 S. W. 2d 639 (1935).

Wurm v. *Allen Cadillac Co.*, 301 Mass. 413, 17 N. E. 2d 305 (1938), employee of occupant of building entitled to benefit of common law rule limiting occupant's liability for injuries to trespasser to those caused by his gross negligence.

Commercial Credit Corp. v. *Harris*, 227 S. W. 2d 886 (Tex. Civ. App. 1950), credit company as agent of lienor can exercise its principal's right of repossession and is not liable in tort or trespass where his principal would not be.

Harding v. *Ohio Casualty Ins. Co.*, 230 Minn. 327, 41 N. W. 2d 818 (1950), agent of insurance company who effects revocation of plaintiff's private detective license not liable where principal is privileged to effect revocation, and is immune from liability therefore.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 276

ROBERT C. HERD & COMPANY, INC.,
Petitioner,

vs.

KRAWILL MACHINERY CORPORATION,
KRAUS MANUFACTURING CORPORATION
AND
ENGINEERING INDUSTRIES INTERNATIONAL, S.A.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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House Report No. 2219, 74th Cong., 2nd Sess.	9, 10
Knauth, *Ocean Bills of Lading* (4th ed.)	6, 9
Poor, *Charter Parties and Ocean Bills of Lading* (3rd ed.)	9
Robinson, *Admiralty* (1939 ed.)	9
Senate Report No. 742, 74th Cong., 1st Sess.	10
2 Williston, *Contracts* (Rev. ed.) §§402, 403	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 276

ROBERT C. HERD & COMPANY, INC.,
Petitioner,

VS.

KRAWILL MACHINERY CORPORATION,
KRAUS MANUFACTURING CORPORATION
AND
ENGINEERING INDUSTRIES INTERNATIONAL, S.A.,
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland on the merits (R. 16-37) is reported at 145 F. Supp. 554, 1956 A.M.C. 2217 and (1957) 1 Lloyd's Rep. 40. The District Court's opinion with respect to the elements of the respondents' damages (R. 37-45), with which this Court is not concerned, is reported at 155 F. Supp. 296 and 1957 A.M.C. 2188. The opinion of the Court of Appeals for the Fourth Circuit is reported at 256 F. 2d 946, 1958 A.M.C. 1265 and (1958) 2 Lloyd's Rep. 159.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1958 (R. 63). The petition for a writ of certiorari was filed on August 11, 1958, and was granted October 13, 1958 (R. 65). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is a stevedore who has offered no choice of rates based on the value of the cargo and who has negligently damaged a shipper's property entitled to limit his liability to the shipper either (1) by virtue of the Carriage of Goods by Sea Act or (2) pursuant to the proposed contract of carriage between the shipper and the carrier to which the stevedore is not a party?

STATUTE INVOLVED

The statute involved is the Carriage of Goods by Sea Act, generally and hereafter called COGSA (Act of April 16, 1936, c. 229, 49 Stat. 1207-1213, 46 U.S.C. §§1300-1315), the pertinent provisions of which have been printed in petitioner's brief (pp. 2-6). The Act sets forth the duties, responsibilities, liabilities, rights and immunities of the carrier and ship without mention of a stevedore.

STATEMENT OF THE CASE

The statement of the case contained in the petitioner's brief is accurate as far as it goes, but the following additions are necessary to give a complete picture.

No bill of lading was ever issued by the carrier for the respondents' damaged crate, all reference to that crate having been deleted after the accident. However the proposed bill of lading was in the form used by the carrier for other shipments made by the respondents. The carrier's bill of

lading, which, like COGSA, referred to the carrier without mention of the stevedore, contained, in addition to the provisions quoted in petitioner's brief (pp. 6-7), the following definition (R. 31): "The term 'Carrier' used herein includes owners, vessels, masters and charterers thereof and any substituted or continuing Carrier."

The District Court found (R. 19) that the petitioner's stevedoring charges were not based on the value of the cargo handled but were in accordance with its usual tariff providing different rates for different commodities. As was customary in the port of Baltimore, such rates were predicated upon weight, density, difficulty of handling and other factors affecting the cost of doing the stevedoring work, but did not vary with the value of the cargo, whether or not declared by the shipper.

The District Court further found (R. 20) that the loss occurred while the stevedore was trying, by working a thin wire under the crate lying on a flat car located on the pier alongside the vessel, to raise the crate slightly in order to place one or more chocks under the skids of the crate so that the regular lifting sling could be placed in position. The District Court subsequently concluded (R. 29) that the loss occurred prior to the time the goods were loaded on board and hence not during the period covered by COGSA. That Court held that the stevedore was not entitled to limit its liability under the provisions of either COGSA or the bill of lading to which it was not a party.

The Court of Appeals found it unnecessary (R. 58) to decide whether the loss occurred during the operation preparatory to loading and thus not within the period subject to the operation of COGSA, since it held that the stevedore was in no event entitled to the benefit of the limitation provisions of that Act.

SUMMARY OF ARGUMENT

When both COGSA and the contract of carriage between the shipper and the carrier refer only to the carrier and do not include the stevedore, either expressly or by necessary implication, and when the legislative history evidences an intention to regulate the rights, privileges, liabilities and immunities of shippers and carriers between themselves and is completely silent with reference to stevedores, a stevedore negligently damaging a shipper's goods should not be permitted to escape the full consequences of its wrongful acts by reliance upon the carrier's statutory or contractual limitations of liability.

Whether judged by the strict construction traditionally accorded exemption from or limitation of liability provisions, or upon consideration of public policy and justice, a negligent stevedore should not be favored and an innocent shipper penalized by relieving the stevedore from liability for all but a small fraction of the shipper's loss. There are no valid reasons justifying the extraordinary immunity claimed by the stevedore. To grant it would not only be manifestly unfair to the shipper but would fail to discourage negligence in a field of activity in which the exercise of due care should be promoted by all available means.

ARGUMENT

POINT I

The Stevedore is not Entitled to Limit its Liability by Virtue of the Carriage of Goods by Sea Act.

The stevedore's claim to limited liability by reason of COGSA presents initially the question of whether COGSA is applicable to the facts of this case, and, if it should be so held, the subsequent question of whether COGSA has any application to the duties, liabilities or immunities of a stevedore.

A. THE EVENTS CAUSING THE LOSS DID NOT OCCUR WITHIN THE PERIOD OF COGSA COVERAGE.

The bill of lading of the carrier here involved did not provide, as was true in that of the carrier in *A. M. Collins & Co. v. Panama Railroad Co.*, 197 F. 2d 893 (5 Cir. 1952), cert. den. 344 U.S. 875, that COGSA should govern the rights and liabilities of the owner of the goods and the carrier before loading and after discharge, as well as during the period when the goods were on the vessel. Accordingly in this case, COGSA, unless it controls *ex proprio vigore*, is not applicable at all.

The respondents' loss occurred during the stevedore's preliminary operations preparatory to lifting the crate in the regular lifting sling (R. 20-21). Under those circumstances the respondents contend that the loss occurred prior to the period covered by COGSA. The Act specifically provides in section 1(e) that "The term 'carriage of goods' covers the period *from the time when the goods are loaded on to the time when they are discharged from the ship.*" (Emphasis supplied.) It also provides in §12:

> "Nothing in this Act shall be construed as superseding any part of the Act entitled 'An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property,' approved February 13, 1893, 27 Stat. 445, 46 U.S. Code 190-198, or of any other law which would be applicable in the absence of this Act, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship."

Thus the Harter Act of February 13, 1893, and not COGSA, governs events prior to the time when the goods are loaded on and after the time they are discharged from the ship.

In determining the limits of the period of COGSA coverage the American cases have used the "tackle to tackle" test. *Mackey et al. v. United States*, 83 F. Supp. 14 (S.D. N.Y. 1948), affirmed 197 F. 2d 241 (2 Cir. 1952); *Federal Insurance Company v. American Export Lines, Inc.*, 113 F. Supp. 540 (S.D.N.Y. 1953); and *Remington Rand, Inc. v. American Export Lines, Inc.*, 132 F. Supp. 129 (S.D.N.Y. 1955). See also Knauth, *Ocean Bills of Lading* (4th ed.), pp. 144-146, which not only favors the tackle to tackle test, but indicates that where, as here, the cargo draft was to be raised by a floating derrick instead of by the ship's tackle, the "loading on", within the meaning of COGSA, does not occur until the cargo is physically within the boundaries of the hull of the ship.

Clearly in this case, as the District Court found (R. 29), the loss occurred during a preliminary operation before any ship's tackle had been attached to the proposed lift and even prior to the attachment of the tackle with which it was contemplated that the goods would be raised. Although the Court of Appeals found it unnecessary to pass on that question (R. 58), agreeing as it did with the District Court that in no event was the stevedore entitled to the benefit of any of the provisions of COGSA, nevertheless further consideration of the general applicability of COGSA is not required if this Court agrees with the respondents that the loss occurred prior to the commencement of the period of COGSA coverage.

B. COGSA Does Not Govern the Liabilities of Stevedores.

If this Court should be of the opinion that the loss occurred during the period of COGSA coverage, the petitioner is not entitled to limit its liability for a loss resulting from its negligence unless it should be held that COGSA

governs the duties, liabilities and immunities of stevedores as well as of carriers. We submit that an examination of the language and legislative history of the Act establishes beyond any doubt that it is not applicable to stevedores.

1. *The Language of the Act.* Throughout COGSA the reference is to the carrier and the ship. Specifically §4(5), which is the basis of the petitioner's asserted right to limit its liability, provides:

> "Neither the *carrier nor the ship* shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package, lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, . . .". (Emphasis supplied.)

Carrier is defined in §1(a) of the Act to include "the owner or the charterer who enters into a contract of carriage with a shipper". Neither there nor elsewhere in the Act is there any mention of the stevedore. The stevedore is thus no more entitled to the statutory privileges and immunities conferred upon the carrier than he would be subject to the carrier's duties and liabilities.

As this Court pointed out in *Brady v. Roosevelt Steamship Company*, 317 U.S. 575 (1943), in denying the contention that the Suits in Admiralty Act made private operators acting as agents for the Government non-suable for their torts, a statute should not be construed to confer immunities not specifically set forth in the statute. This Court said at page 579:

> "The wording of that section [section 1 of the Suits in Admiralty Act] makes clear that the right to arrest or seize the vessel was taken away whether the vessel was operated by the United States or its wholly owned corporation or for either of them by a private company. To that extent the Act affects remedies which would

> otherwise exist on maritime causes of action arising out of operation of government vessels by private companies for the United States or its wholly owned corporations. *Yet there is no indication whatsoever that it went further and took away any personal remedy which a tort claimant might have against such a private operator.*" (Emphasis supplied.)

and again at pages 580-1:

> "We may also assume that it would have the power to grant immunity to private operators of government vessels for their torts. *But such a basic change in one of the fundamentals of the law of agency should hardly be left to conjecture. The withdrawal of the right to sue the agent for his torts would result at times in a substantial dilution of the rights of claimants. . . . We can only conclude that if Congress had intended to make such an inroad on the rights of claimants it would have said so in unambiguous terms.*" (Emphasis supplied.)

In determining the proper meaning of COGSA, it seems manifest that, in the absence of any mention whatsoever of stevedores or their rights, liabilities and immunities, the Act should not be so construed as to confer upon stevedores the benefits of limited liability accorded to the carrier, in exchange for other burdens assumed by the carrier, when to do so would result in a "substantial dilution of the rights of claimants".

Nor is there anything unusual in construing a statute so as to limit its benefits and limitations to the party named therein and in declining to extend it to other persons acting in related capacities. For instance, under the Limitation of Liability Statutes (Act of March 3, 1851, c. 43, 9 Stat. 635, 46 U.S.C. §§183-188), the right to limit liability, although expressly granted to an owner or a charterer *pro hac vice*, has been denied to a mere bailee in *The Severance*, 152 F.

2d 916 at 921 (4 Cir. 1945) and *Jones & Laughlin Steel Corporation v. Vang*, 73 F. 2d 88 (3 Cir. 1934), cert. den. 294 U.S. 735; to one employing another to perform his towing engagements in *In Re Reichert Towing Line*, 251 Fed. 214 at 217 (2 Cir. 1918), cert. den. 248 U.S. 565; to a vendor and manufacturer retaining security title in *American Car & Foundry Co. v. Brassert*, 289 U.S. 261; and to a lighterman in *Smith v. Booth*, 110 Fed. 680 (S.D.N.Y. 1901), affirmed 122 Fed. 626 (2 Cir. 1903). Likewise under the Fire Statute (Act of March 3, 1851, c. 43, 9 Stat. 645, 46 U.S.C. §182) the right to limit liability, although clearly available to the owner *in personam* and the ship *in rem*, as held in *Consumers Import Co. v. Kabushiki Kaisha*, 320 U.S. 249 (1943), was denied to a time charterer in *Accinanto, Ltd. v. Cosmopolitan Shipping Company et al.*, 99 F. Supp. 261 at 264 (D.C. Md. 1951), reversed on other grounds, 199 F. 2d 134 (4 Cir. 1952), cert. den. 345 U.S. 992 (1953).

2. *The Legislative History.* It has been well recognized and frequently stated that COGSA is based on the Hague Rules, which in turn embodied many of the principles of the Harter Act (Act of February 13, 1893, c. 105, 27 Stat. 445, 46 U.S.C. §§190-196). See H. Rep. No. 2219, 74th Cong., 2nd Sess., pp. 4 and 7; and Knauth, *op. cit.* pp. 124-130. There is nothing in either the Harter Act, or the decisions construing it, to indicate that that Act, despite its broad wording, had any application to stevedores. It was generally considered to govern only the relations between the carrier and the ship on the one hand and the cargo owner on the other. See Poor, *Charter Parties and Ocean Bills of Lading* (3d ed.), p. 129, Robinson, *Admiralty* (1939 ed.), p. 506; and Green, *The Harter Act*, 16 Harvard L. Rev. 157-177.

In *Reid v. American Express Company*, 241 U.S. 544 (1916), a case arising under the Harter Act, the carrier's

right to limit its liability was sustained, but no such limitation was granted the negligent stevedore. There were no decisions to the contrary prior to the consideration and enactment of COGSA. No reference whatever to stevedores appears in the reports of the Congressional committees considering the enactment of COGSA. See S. Rep. No. 742, 74th Cong., 1st Sess., and H. Rep. No. 2218, 74th Cong., 2nd Sess. The silence of Congress on the subject completely negatives any idea that stevedores were to be granted the same immunities as carriers, particularly in light of the decision in the *American Express* case. The Court of Appeals was thus obviously correct in its construction of COGSA on that point (R. 54 and 58).

We submit that a statute conferring exemptions from or limitations of liability, and thus in derogation of the common law, should be strictly construed and should not be extended by implication for the benefit of persons mentioned neither in the Act nor in the deliberations of Congress.

C. The Collins Case and Similar Authorities Are Clearly Erroneous.

The petitioner relies primarily on *A. M. Collins & Co. v. Panama Railroad Company*, 197 F. 2d 893 (5 Cir. 1952). The decision in that case was accepted and followed rather uncritically, and without adequate or much of any discussion in most of the other cases relied upon by the petitioner, with the possible exception of *Ford Motor Corporation v. Jarka Corporation*, 134 N.Y. Supp. 2d 52 (Munic. Ct. of N.Y. City, 1954). In the latter case the Municipal Judge relied on certain decisions of the Supreme Court of New South Wales, later overruled by the High Court of Australia in *Wilson v. Darling Island Stevedoring and Lighterage Company, Ltd.*, (1956) 1 Lloyd's Rep. 346, (1956) Argus Law

Rep. 311, 29 Australian Law Journal 740, hereinafter discussed at pages 14-18.

The *Collins* decision, by a divided court, was carefully considered by both the District Court and the Court of Appeals in this case, and in each instance the reasoning in Judge Holmes' dissenting opinion was regarded as sounder than the views expressed by the majority (R. 34 and 55). The *Collins* decision has also been criticized in a comment in 66 Harvard Law Rev. 530 upon the ground, among others, that there was nothing either in the language of COGSA or its legislative history to support the majority statement that Congress must have intended the Act to benefit the stevedore as well as the carrier. That comment also criticizes the Court's reliance on the *Restatement of the Law of Agency* §347 (1933), which provides:

> "Applicable Immunities of Principal.
>
> An agent who is acting in pursuance of his authority has such immunities of the principal as are not personal to the principal."

Any thought that the suggested rule is applicable to a case such as this is dispelled by an examination of the accompanying comments and illustrations in the Restatement, as indeed the District Court pointed out (R. 31-32) in discussing the erroneous views of the *Collins* majority on the agency point. The American Law Institute has apparently realized that, in its original form, §347 might be misleading. In *Restatement of the Law, Second, Agency 2d* (1958), §347 has been revised to read:

> "Immunities and Standard of Care of Principal
>
> (1) An agent does not have the immunities of his principal although acting at the direction of the principal.
>
> (2) Where, because of his relation to a third person, a master owes no duty, or a diminished duty, of care, a servant in the performance of his master's work owes

no greater duty, unless there has been reliance by the master or by a third person upon a greater undertaking by the servant."

In the Reporter's notes (Appendix §345) it is said:

"Sections 345, 346 and 347 deal with the defenses which an agent may have because he is doing an act which the principal would be privileged to do or is himself protecting the interests of the principal. Section 347 in its original form stated that 'an agent acting in pursuance of his authority has the immunities of a principal which were not personal to the principal.' Reconsideration of this language has convinced the group that the word immunity was improperly used to cover situations for which other phrasing should be used. Hence the Section has been changed to read as it is at present, distinguishing between immunities, privileges, and the lack of duty or diminished duty of care which is owed to special groups of persons under some circumstances. This distinction is pointed out in §217."

Nor is the *Collins* majority on any sounder ground in its reasoning that the carrier would in some way be denied the benefits intended by COGSA unless similar immunities were granted the stevedore. No basis whatsoever exists for the suggestion that the carrier's limited liability is in any way affected by imposing full liability upon a negligent stevedore.

See also *United Fruit Company v. United States*, 33 F. 2d 664 (5 Cir., 1929), in which the same court that decided the *Collins* case had held that the Government might sue the carrier for loss of registered mail without being limited in its recovery to the amount of its own liability as fixed by postal regulations.

Recently, in *International Milling Co. v. Steamship Perseus and Nicholson Transit Company*, 1958 A.M.C. 526

(E.D. Mich.), another District Court in a case presenting a related question, viz. whether a negligent master was entitled to the benefits of §4(2)(a) exempting the carrier and the ship from liability for loss resulting from negligent navigation, declined to follow the *Collins* case and accepted instead the reasoning of the District Court in this case.

Point II

The Stevedore is not Entitled to Limit its Liability By Virtue of the Bill of Lading.

Apprehending that it might be denied the shelter of any statutory limitation the petitioner also asserted a right to limit its liability by reason of a somewhat similar contractual limitation in the carrier's bill of lading. (See clause 30, R. 18.) No support can be found for such a claim in any reasonable construction of the contractual provision.

A. The Contractual Language.

Just as in COGSA, so in the bill of lading there is no mention whatever of the stevedore. Throughout the reference is to the "carrier", which is defined to include owners, vessels, masters and charterers and any substituted or continuing carrier, but not a stevedore. Specifically clause 30 of the bill of lading limits the liability of the *carrier* and not of anyone else. Had there been any intention on the part of the carrier to include the stevedore as a beneficiary of the limitation provisions nothing would have been simpler than to say so, as the comment in 66 Harvard Law Rev. 530 at 531 most aptly remarked in criticizing the *Collins* case. On the contrary the failure of the bill of lading to include any reference to stevedores clearly demonstrates, to use the language of Judge Holmes, dissenting in the *Collins* case (197 F. 2d 893 at 898), that

". . . it did not confer upon the carrier the power to diffuse partial dispensations to its negligent stevedores or other agents for their wrongful acts."

Exemption or limitation of liability clauses are and should be strictly construed. As Mr. Justice Frankfurter said in his concurring opinion in *The Boston Metals Co. v. The Winding Gulf*, 349 U.S. 122 (1955) at 123:

> *"Release-from-liability clauses generally*, and specifically with regard to towage contracts, *are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties.* Even when such a clause undeniably alters the normal relationship between tug and tow as to some aspects of liability for negligence, it is not to be construed to impose every consequence of the tug's negligence upon the tow unless the clause decisively requires this result." (Emphasis supplied.)

If such an unquestionably sound construction is applicable to the parties to the contract it is doubly so as to a third person allegedly bound by its terms.

B. The Decisions Denying Third Parties the Benefit of Contractual Exemptions.

The case most clearly presenting the question of when, if at all, third persons may be entitled to the benefits of contractual exemptions or limitations contained in agreements between other parties, and one resembling in many respects the problem presented in this case is the recent decision of the High Court of Australia in *Wilson v. Darling Island Stevedoring and Lighterage Company, Ltd.*, (1956) 1 Lloyd's Rep. 346, (1956) Argus Law Rep. 11, 29 Australian Law Journal 740. The facts there were that cases of tulle soie and rayon had been shipped from Marseilles to Sidney under a bill of lading subject by its terms to the

British Carriage of Goods by Sea Act, and containing, among others, a clause limiting the carrier's period of responsibility and providing that before loading and after discharge the goods in the custody of the carrier or his servants or agents, whether being forwarded, stored or awaiting transhipment, were in such custody at the sole risk of the owner of the goods, and that the carrier was not liable for any loss or damage whatsoever. After the vessel arrived in Sidney the goods were discharged by the defendant who was an independent stevedore employed by the carrier. On the day following the discharge the goods were damaged by water while in the defendant's warehouse as the result of a fracture of a water pipe due to the defendant's negligent operation of a mobile crane. When sued by the owner of the goods the defendant alleged that under the bill of lading the goods, following discharge from the vessel, were at the sole risk of the owner of the goods and claimed that it was entitled to the benefit of that provision between the shipper and the vessel owner. In full and careful opinions the majority of the High Court of Australia held that the defendant was not entitled to the contractual exemption, thereby overruling the contrary decisions of the Supreme Court of New South Wales in *Gilbert Stokes & Kerr Proprietary, Ltd. v. Dalgety & Co., Ltd.*, (1948) 48 S.R. (N.S.W.) 435, 81 Ll. L. Rep. 337, and *Waters Trading Company, Ltd. v. Dalgety & Co., Ltd.*, (1951) 52 S.R. (N.S.W.) 4, (1951) 2 Lloyd's Rep. 385.

In his opinion Justice Fullagar said (at page 364 of the Lloyd's Rep.):

> "The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. He is engaged by the shipowner and by nobody else, and the terms on which he handles the goods are to be found in his contract with the shipowner and nowhere

else. The shipowner has no authority whatever to bind the shipper or consignee of cargo by contract with the stevedore, and there is, in my opinion, no principle of law — deducible from the *Elder Dempster case, sup.*, or from any other case — which compels the inference of any contract between the shipper or consignee and the stevedore. If the stevedore negligently soaks cargo with water and ruins it, I can find neither rule of law nor contract to save him from the normal consequences of his tort. The *Gilbert Stokes case, sup.*, and the *Waters Trading Company case, sup.*, were, in my opinion, wrongly decided, and I think that they should be overruled."

Justice Kitto, who concurred with Justice Fullagar and with Chief Justice Dixon in denying the stevedore the benefit of the bill of lading provisions, said (at page 368 of the Lloyd's Rep.):

"The exemption provision I have quoted certainly begins by stating that goods in the custody of the carrier or his agents or servants after discharge are in such custody at the sole risk of the owners of the goods, but this I read as intended to exclude the carrier only from the risk; for the sentence proceeds, without a break, to state as the consequences that the carrier — no mention being made of his agents or servants — shall not be liable for loss or damage. And clearly the implication of an exclusion of liability on the part of stevedores is not required in order to give the bill of lading business efficacy. It has been said that provisions excluding liability for negligence should receive a strict construction. At least there should be no leaning in favour of a construction which would extend, further than the words used require, the class of persons who are set free to be as careless as they choose without risk of liability. It is true that, having regard both to the nature of the services contracted for and to the corporate character of the carrier, the inference is inescapable that both parties contemplated that the carrier would perform its obligations through servants or

other persons engaged for the purpose, and that the operations involved in the process described in the case stated as sorting, stacking and storing of the cargo after discharge at the port of destination was an operation naturally to be performed through the agency of stevedores. A necessity for the carrier to depend upon others to perform his obligations under the contract suggests a strong reason why he should have desired to stipulate for immunity for himself from liability for loss or damage in the course of the performance of those obligations. But there is no such readily discernible reason why he should concern himself to make, or should be understood as making, a similar stipulation for the benefit of those whom he should engage as servants, stevedores and the like; and still less is there any ground for understanding the consignor as conceding immunity to such persons. The train of thought of which the exemption clause is a natural expression is that, since the carrier has no alternative but to rely upon others to do the work involved in producing the result contracted for, it is mutually agreeable that he should not have to bear responsibility for any failure of theirs to observe proper standards in the work they do, but that the consignor shall look to them alone to make good any loss or damage which their default may cause."

The decision of the High Court of Australia was not, as claimed in the brief of the National Association of Stevedores as *amicus curiae* (footnote on page 11), a retreat from the tendency of the English decisions. We shall have more to say hereafter concerning the decision in *Elder Dempster & Co., Ltd. v. Paterson, Zochonis & Co., Ltd.*, (1924) A.C. 522, 18 Ll. L. Rep. 319, of which mention is made in the opposing briefs, but it may be remarked here that the decision of the High Court of Australia does not differ from but is in entire accord with the recent English decisions in *Cosgrove v. Horsfall*, 62 T.L.R. 140 (1945) and *Adler v. Dickson*, (1955) 1 Q.B. 158, (1954) 2 Lloyd's Rep. 267. In

his opinion Justice Fullagar relied on both cases and reviewed the *Adler* case at length. In the *Cosgrove* case the holder of a free pass exonerating a bus company for injuries however caused sued the negligent bus driver. The bus driver relied on the carrier's exemption, but the Court denied the defense on the ground that the driver was not a party to the contract. In *Adler v. Dickson* the Court of Appeals affirmed a decision of the Queen's Bench Division, holding, in a suit by a passenger against the master and boatswain of a vessel to recover for an injury resulting from their negligence in placing a gangway on the vessel, that the defendants were not entitled to rely on a ticket provision that the company should not be liable to the passenger for any injury, even if due to the negligence of the company's servants. Those recent English decisions are entirely in accord with the majority of the High Court of Australia. To the same effect is the decision of the Supreme Court of South Carolina in *Parker v. Bissonette*, 203 S.C. 155, 26 S.E. 2d 497 (1943), holding that a railroad issuing passes exempting it from liability for negligence does not confer a similar exemption on its negligent employees.

Such decisions are also entirely consistent with general principles governing the rights of alleged beneficiaries under contracts to which they are not parties. See *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 at 307 (1927); *Restatement of the Law of Contracts*, §§133 and 147; and 2 Williston on *Contracts* (Rev. ed.) §§402 and 403.

C. The Elder Dempster Case Is Not To The Contrary.

In the brief of the petitioner and the supporting brief of the National Association of Stevedores great reliance is placed on the decision in *Elder, Dempster & Co., Ltd. v. Paterson, Zochonis & Co., Ltd.*, (1924) A.C. 522, 18 Ll. L.

Rep. 319. As the District Court remarked (R. 34), *Elder Dempster* is a difficult case because of the different reasons given by the several Law Lords for their conclusions. That was an action by a shipper against the owner and time charterer of a vessel for damage to palm oil casks crushed due to negligent stowage, the loss occurring before the passage of the British Carriage of Goods by Sea Act. The bill of lading contained exoneration provisions for negligent stowage, but did not release liability resulting from unseaworthiness. The exemptions in the bill of lading provided that "the shipowner" should not be liable. In the lower court the vessel was held unseaworthy and liability was imposed on both the time charterer and the owner. The House of Lords reversed the finding of unseaworthiness and held the loss due to negligent stowage. It thereupon exonerated the charterer and discussed whether the shipowner was also entitled to the exemption contained in the charterer's bill of lading, and concluded that he was. The real basis of the decision is well analyzed in the opinions of Justice Fullagar and Justice Kitto of the High Court of Australia in *Wilson v. Darling Island Stevedoring and Lighterage Company, Ltd.*, (1956) 1 Lloyd's Rep. 346, (1956) Argus Law Rep. 311, 29 Australian Law Journal 740. Justice Fullagar said (at page 359 of the Lloyd's Rep.):

> "The second observation I would make is this. What has been supposed to be a principle involved in the *Elder Dempster case, sup.*, (although there is a conspicuous lack of unanimity as to what that principle really is) has, as will be seen, been extended so as to give to a stevedore exemption from liability for negligence by virtue of a provision in a bill of lading to which the stevedore is not a party, and which is really no concern whatever of the stevedore. This appears to me to be a 'development' of the common law which is altogether out of character, and which is exactly the opposite of what one would have expected and felt to be

justified. It is all the more remarkable in view of the fact that the modern tendency has been to expand the field of liability in tort. The common law has, I think, from quite early times — consistently with its general policy of freedom of contract — allowed the validity of provisions in a contract which limit or exclude liability for negligence. But it has always frowned upon such provisions and insisted on construing them strictly. In *Peek v. North Staffordshire Railway Company*, (1863) 10 H.L.C. 473, the judges advised the Lords, and the Lords held, that a condition relieving a carrier from all liability for the neglect or default of his servants was neither just nor reasonable within the meaning of a statute. The traditional attitude of the common law is perhaps nowhere more clearly illustrated than in a passage in the judgment of Denning, L. J., in *Adler v. Dickson*, (1954) 2 Lloyd's Rep. 267, at p. 270, at the end of which he refers to *Peek's case, sup.*, and particularly to the judgment of Blackburn, J. And yet we seem to discern in the latter part of that very judgment, in the New South Wales decisions which are challenged on this appeal, and in two or three other recent cases, a curious, and seemingly irresistible, anxiety to save grossly negligent people from the normal consequences of their negligence — an anxiety which refuses to be baulked even by so well established a general doctrine as that of *Tweddle v. Atkinson*, (1861) 1 B. & S. 393. This seems to me to be an extraordinary phenomenon, and I am sure that it would have surprised both Lord Blackburn and Lord Sumner."

After discussing *Waters Trading Company, Ltd. v. Dalgety & Co., Ltd.*, (1951) 52 S.R. (N.S.W.) 4, (1951) 2 Lloyd's Rep. 385, Justice Fullagar continued at page 361:

"It purports to apply the *Elder Dempster case, sup.*, but the difficulty felt about formulating the true rule is indicated by such expressions as that used by Herron, J., (52 S.R. (N.S.W.) at p. 15; [1951] 2 Lloyd's Rep. at p. 395):

> Whatever may be the precise legal ground on which the immunity of the agent can be supported . . .
>
> When no precise legal ground for supporting an immunity can be found, there must be strong reason for suspecting that the immunity cannot be supported at all."

He then reviewed *Adler v. Dickson,* (1955) 1 Q.B. 158; (1954) 2 Lloyd's Rep. 267, and said (at page 363 of (1956) 1 Lloyd's Rep.):

> "I have quoted at some length from the judgment of Jenkins, L.J., in *Adler v. Dickson, sup.,* because I respectfully and entirely agree with the views expressed by his Lordship. I do not think that anybody has yet succeeded in satisfactorily formulating any new and far-reaching principle as being involved in the *Elder Dempster case, sup.,* and the simplest explanation of this fact is that there is no such principle involved. As Jenkins, L.J., said, it can well be explained by reference to its own facts. It turned, in my opinion, on the very special and peculiar relationships which are created when goods are consigned to be carried on a chartered ship."

and at page 364:

> "In my opinion, what the *Elder Dempster case, sup.,* decided, and all that it decided, is that in such a case, the master having signed the bill of lading, the proper inference is that the shipowner when he received the goods into his possession, receives them on the terms of the bill of lading. The same inference might perhaps be drawn in some cases even if the charterer himself signed the bill of lading, but it is unnecessary to consider any such question."

In his opinion Justice Kitto also discussed the *Elder Dempster* case at length. He said at pages 364-5:

> "It may be remarked at once that if any of the noble Lords who took part in that case had in mind to lay

> down any general rule concerning the exclusion of common law liabilities, at least there is no trace of any intention to make an inroad upon any established principle, least of all the elementary general rule that the only persons entitled to the benefits or bound by the obligations of a contract are the parties to it. On the contrary, their Lordships all appear to have approached the problem as one to be solved by the application of known principles to special circumstances."

After reviewing the opinions of the several Law Lords, he concluded (at page 367):

> "The cardinal point to observe, however, is that the task is one of examining the facts and construing the documents of the individual case, for the purpose of discovering whether a duty of care which normally would have arisen was waived by an appropriate consent. In my view it is a mistake to suppose that an easy road has been provided by the laying down in the *Elder Dempster case, sup.*, of a new principle of law which atones for its heterodoxy by the convenience of its results."

So understood, it is obvious that the *Elder Dempster* case is in no way contrary to the principles underlying the judgment here questioned.

Point III

Considerations of Fairness and Public Policy Also Require that the Judgment be Affirmed.

Wholly apart from the construction of the statutory and contractual provisions by reference to the language used and the underlying legislative history, the stevedore's asserted right to limit its liability for negligence should be denied for reasons of public policy and to secure just compensation to a person whose property is negligently damaged by another. We think that is abundantly clear from

a consideration of the reasons advanced in favor of extending the limitation to stevedores when contrasted with the basic principles requiring a denial of any such immunity.

A. There Are No Valid Reasons For Granting The Stevedore The Benefit Of The Carrier's Limitation Of Liability.

Various reasons have been assigned in the petitioner's brief and in the supporting brief of the National Association of Stevedores in an effort to buttress the stevedore's claim to an exemption not specifically conferred upon it either by statute or contract. The principal reasons, some of which raise issues without factual support in this case, appear to be that (1) the stevedore is doing the carrier's work, and the relationship between them cannot be ignored; (2) the stevedore must be granted the carrier's limitation to effectuate the policies of COGSA; and (3) to deny the stevedore the carrier's limited liability would result in (a) a windfall to the shipper, (b) different measures of liability on the part of the carrier and the stevedore for the same occurrence, and (c) discrimination against the contract stevedore in favor of the house stevedore. We submit that individually and collectively the arguments advanced on those grounds are without merit.

1. *That the Stevedore is Doing the Carrier's Work is not Controlling.* Much is made of the fact that in performing loading and discharging operations the stevedore is doing what the carrier is obligated to do. From that relationship the petitioner proceeds to the conclusion that the stevedore is entitled to all the carrier's benefits granted by COGSA or reserved in the bill of lading. Not only does that assume the answer to the very question in issue, but, in view of the fact that every agent performs his principal's work, its acceptance would work a startling change in the existing law

as to the liability of agents to third persons. The inevitable result of any such reasoning is wholly without justification.

2. *Denying the Stevedore the Carrier's Limitation of Liability in no way Affects COGSA.* It has been urged that unless the stevedore is granted the carrier's limitation of liability the broad purpose and policies of COGSA will in some unspecified manner be emasculated. It is doubtless true that the purpose of COGSA, as of the Hague Rules, was to promote uniformity in the provisions of bills of lading and in the respective rights and liabilities, *inter sese*, of the shipper and carrier of goods in ocean transportation; but that purpose has no relation whatever, either express or implied, to stevedores. It is suggested that the consequence of the denial might be that the carrier would be called upon to indemnify the stevedore for the latter's liability, and hence that a greater burden would be imposed upon the carrier than contemplated by COGSA. There is certainly no foundation for any such suggestion in the facts of this case, or in any other case where the stevedore's negligence has caused the damage. If the carrier undertakes to indemnify the stevedore against the consequences of the latter's negligence, it will do so with its eyes open. Furthermore, as this Court pointed out in *Brady v. Roosevelt Steamship Co.*, 317 U.S. 575 at 583-4, the existence of a right to indemnity should not, in the absence of a clear Congressional policy, shield a tortfeasor from liability for the negligent exercise of a delegated power.

3. *Denying the Stevedore the Carrier's Limitation of Liability Produces no Unreasonable Results.* We think an examination of the results which the petitioner claims will flow from an affirmance of the judgment in this case will show that such fears are either without foundation in fact or constitute no reason for granting the limitation.

(a) *The windfall argument.* First it is claimed that to impose full liability upon the stevedore will give the shipper a windfall. It is difficult to follow the process of reasoning which regards the shipper's rights as in some way enhanced when he has suffered loss at the hands of a third party with whom he has had no contractual dealings and whose duties and liabilities to him are nowhere defined. It seems to rest on the curious premise that the recovery of damages sustained at the hands of a negligent tortfeasor is an unusual result, seldom encountered and not to be encouraged! It is further said that the alleged windfall will operate to upset the existing cost bases in the marine insurance industry without ultimate gain or advantage to any interest. There is no factual support whatsoever for such a statement, or to establish the corollary proposition that the cargo underwriter increased its premiums following the *Collins* decision in 1952, which was the first instance of which we are aware in which a stevedore was relieved from the full consequences of the negligent performance of its duties. Furthermore such a reason for denying full recovery to the cargo owner is very small comfort to the uninsured shipper or to one who, as here, is only partially insured. The vice of the petitioner's windfall argument is that, if sustained, there would be a windfall, but in favor of the negligent stevedore. If there is to be any windfall — and that seems a questionable characterization — it should certainly go to the innocent shipper and not to the negligent tortfeasor.

(b) *The different liability argument.* The stevedore here contends that to allow full recovery against the stevedore when the carrier has only limited liability would establish different measures of liability for what is alleged to be basically the same tort. Such a result is entirely proper and in accord with established principles. As the Court of

Appeals for the Second Circuit remarked in *Quinn v. Southgate Nelson Corp.*, 121 F. 2d 190 at 191 (1941), cert. den. 314 U.S. 682:

> "That a principal is liable for a wrong does not necessarily immunize his agent. Blumenthal & Co. v. United States, 2 Cir. 1929, 30 F. 2d 247, 248, 249; Sloan Shipyards v. United States Fleet Corp., 1922, 258 U.S. 549, 567, 568, 42 S. Ct. 386, 66 L. Ed. 762. *The books are full of instances where dual liabilities are not alternatives or mutually exclusive; a plaintiff may be lucky enough to have a two-stringed bow.*" (Emphasis supplied.)

Nor is there any reason why the strings may not be of varying lengths. There are many cases of differing measures of liability which have not yet been, and we do not think will be, held to be improper. For example, when a stevedore's employee is injured aboard a vessel due to unseaworthy conditions, the stevedore's liability to the employee is limited by the Longshoremen's and Harbor Worker's Act (Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U.S.C. §§901-950). No one has yet suggested that the ship, merely because the stevedore is doing the ship's job of loading or discharging, is entitled to the stevedore's limited liability — even in those cases where the injury results primarily from the fault of the stevedore or due to its defective gear, as in *Petterson v. Alaska Steamship Co., Inc.*, 205 F. 2d 478, (9 Cir. 1953), affirmed 347 U.S. 396 (1954). Again in *The Steel Inventor*, 35 F. Supp. 986 at 996 (D.C. Md. 1940), Judge Chesnut recognized the co-existence of varying measures of the liabilities of a carrier and a lighterage company. Finally *Reid v. American Express Company*, 241 U.S. 544 (1916), is an instance of the different liability of a carrier and of a stevedore in a case very similar to this case. Consequently, as Chief Judge Sobeloff said for the Court of Appeals (R. 55), there is no incongruity in limiting the lia-

bility of the ship and its owner without similarly limiting the stevedore's liability for its own tort.

(c) *The alleged discrimination against the contract stevedore.* Without explaining that the result reached in this case restores the situation prevailing prior to 1952 when the *Collins* case was decided, it is argued that this case causes discrimination by imposing burdens on the contract stevedore not experienced by the house stevedore, *i.e.*, the steamship company which does its own stevedoring, without the intervention of a separate corporation or an independent contractor. It is difficult to believe that a reversion to the situation as it existed only six years ago would result in driving the contract stevedore out of business or in seriously prejudicing him in competition with the steamship line doing its own stevedoring. Certainly it is not and cannot successfully be claimed that other advantages of the house stevedore have had any such eroding effect. The steamship line which does its own stevedoring is the employer of the stevedores and as such its liability to a stevedore injured on one of its ships as a result of the ship's fault is limited by the terms of the Longshoremen's and Harbor Worker's Compensation Act. On the contrary the steamship line which employs an independent stevedore would, for precisely the same fault, be held liable, without statutory limitation, for whatever damages the injured man sustained. Although that condition has existed since the passage of the Compensation Act in 1927, it obviously has not resulted in such discrimination in favor of the house stevedore as to cause the contract stevedore any substantial loss of business. It is fantastic to assume that the alleged discrimination in this case would produce any appreciable effect on the stevedoring industry.

B. Fairness And Justice Require The Denial Of The Stevedore's Claim To Limit Its Liability.

On behalf of the shipper the following reasons demonstrate that there is no justification for extending the carrier's limited liability to the stevedore, namely: (1) the stevedore has given no consideration for the requested exemption; (2) the granting of such an exemption would place a premium upon negligence; and (3) it would be manifestly unfair so to deprive an injured party of his right to be made whole at the expense of a negligent tortfeasor. Any one of those reasons justifies a denial of the defense asserted by the stevedore in this case.

1. *The Stevedore Gave no Consideration in Exchange for Limited Liability.* As both courts below pointed out (R. 19 and 54) the stevedore here, as was customary in the Port of Baltimore, based its charges upon weight, density, difficulty of handling the cargo in question and other factors affecting the costs of doing the stevedoring work, and the value of the cargo, whether or not declared by the shipper, did not affect the charges. No choice of rates was offered in exchange for the limited liability which the stevedore now seeks to obtain. The stevedore tendered nothing to the shipper in return for the requested immunity. Whether or not the stevedore could validly have contracted for reduced or no liability is not now before this Court. The fact is that the stevedore made no such agreement with the carrier and no agreement at all with the shipper. The stevedore is not therefore in the same position as the carrier, who was granted the limitation of liability provided in COGSA, as well as certain other immunities, as partial compensation for the impairment or restriction of the carrier's freedom of contract — as, for example, the deprivation of the right to include in its bill of lading

certain provisions with respect to notice of loss, time within which claims must be made and/or suit filed, and a reduction of liability even below $500 per package. No similar or indeed any burdens were assumed by the stevedore, and no reason exists for granting it the carrier's privileges and immunities.

2. *To Grant the Limitation to a Stevedore Would Place a Premium on Negligence.* Limitation of liability clauses, just like exemption from liability provisions, are contrary to public policy and should not be sustained except for the most convincing reasons or because of a definitive and compelling legislative mandate. The reason is not far to seek. The public interest is best served by a policy which discourages negligence and promotes the exercise of due care. This Court recently had occasion to consider the effect of exoneration clauses in towage contract relieving the tower from all liability for negligent towage. In *Bisso v. Inland Waterways Corporation*, 349 U.S. 85 (1955), the Court said at page 90:

> ". . . Because of this judicial history and cogent reasons in support of a rule outlawing such contracts we now, despite past uncertainty and difference among the circuits, accept this as the controlling rule.
>
> This rule is merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships such as bailors and bailees, employers and employees, public service companies and their customers. The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. These two reasons are no less applicable today than when *The Syracuse* and *The Wash Gray* were decided. And both reasons apply with equal force whether tugs

operate as common carriers or contract carriers. The dangers of modern machines make it all the more necessary that negligence be discouraged. And increased maritime traffic of today makes it not less but more important that vessels in American ports be able to obtain towage free of monopolistic compulsions."

3. *To Permit the Stevedore to Limit its Liability is Manifestly Unfair to the Shipper.* The very statement of the petitioner's proposal that the recovery of an innocent cargo owner be limited to a mere fraction of the loss caused by the negligent tortfeasor demonstrates the gross inequity and unfairness of such a proposition. No provisions requiring and no valid reasons justifying such a result have been advanced by the petitioner or anyone else.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be affirmed.

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LESLIE W. FLEMING,
Of Counsel.

December 18, 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 276

ROBERT C. HEED & COMPANY, INC.,

Petitioner,

v.

KRAWIEL MACHINERY CORPORATION, KRAL'S MANUFACTURING CORPORATION, and ENGINEERING INDUSTRIES INTERNATIONAL, S. A.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS, AS *AMICUS CURIAE*

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS, AS *AMICUS CURIAE*

The American Institute of Marine Underwriters respectfully files this brief, as *amicus curiae*, in support of respondents. The written consent of all parties to the filing of this brief is submitted herewith. It is filed within the time allowed for the filing of the brief of the parties supported.*

---

* Rule 42(2), Supreme Court of the United States Revised Rules (1954).

Statement

Petitioner, a stevedore, was held liable in the sum of about $48,000, because its negligence damaged a 19 ton crated press in the course of its transfer from a railroad flat car, lying on a pier, to the S. S. "Castillo Ampudia". The decision of the District Court on the merits is reported at 145 F. Supp. 554. The opinion of the Court of Appeals for the Fourth Circuit is reported at 256 F. (2d) 946.

The issue of negligence was not contested in the appellate court: the question there presented was whether the petitioner, as stevedore, was entitled to the protection of the ocean carrier's limitation of liability to $500 per package, as provided by the United States Carriage of Goods by Sea Act (46 U. S. Code 1304(5)) and the parallel provisions of the ocean carrier's bill of lading (R. 18-19).

The Appellate Court was unanimous in finding adversely to petitioner's contention, and made the following observations:

> "Nothing in the language or history of the legislation indicates a purpose to regulate a stevedore's liability (R. 53-54) * * *. We perceive no incongruity in limiting the liability of the ship or its owners, without similarly limiting the stevedore's liability for its tort (R. 55) * * * limitation of liability is not automatically available to a stevedore who negligently damages cargo" (R. 58).

Petitioner relies upon the majority opinion of the Court of Appeals for the Fifth Circuit in *Collins &*

Co. v. *Panama R. Co.*, 197 F. (2d) 893 (1952), which held that the stevedore therein who negligently damaged cargo during discharge from ship to dock, was the ship's agent and, therefore, entitled to any immunity provided by the bill of lading, specifically, the provision limiting the liability of the carrier to $500 per package, as permitted by Section 4(5) of the Carriage of Goods by Sea Act. In the present case, the Court of Appeals reached a contrary conclusion, stating that the reasoning of the dissenting judge in the *Collins* case (Holmes, J.) was more persuasive than that set out in the prevailing opinion. The dissenting judge observed that

> "There is no such doctrine as vicarious immunity from liability for torts" (p. 897);

and that a carrier is not authorized

> "to diffuse partial dispensations to its negligent stevedores or other agents for their wrongful acts" (p. 898).

Interest of *Amicus Curiae*

The American Institute of Marine Underwriters is a non-profit, voluntary trade association whose members are engaged in affording marine coverage in all its varied aspects. Its members, most of whom are engaged in business on a nation-wide scale, comprise virtually all of the marine insurance companies in this country. As an important feature of the business of the members of the Institute is the writing of insurance on cargo transported to and from this country by sea, the extent of a steyedore's liability for damage to such shipments is of vital interest to them.

The American Institute of Marine Underwriters appeared at Congressional hearings during the period 1921 to 1936, when the legislation which resulted in the enactment of the Carriage of Goods by Sea Act, was under consideration. The Institute has heretofore filed briefs, *amicus curiae,* in litigation involving the construction of various provisions of that statute.

The Question Presented

May a stevedore, who negligently damages cargo while preparing it for transfer from dock to ship, claim the benefit of the limited liability provisions of the Carriage of Goods by Sea Act (46 U. S. Code 1304(5)); hereinafter referred to as COGSA, and a parallel provision of the bill of lading (R. 18-19) patterned thereon, which limit the liability of an ocean carrier to $500 per package.

Summary of Argument

The decision of this Court in *Reid* v. *American Express Co.,* 241 U. S. 544 (1916), embodies the rule of law applicable to this case.

The legislative history of COGSA, enacted in 1936, gives no indication that Congress intended to change the rule of a stevedore's independent unlimited liability applied by this Court in the *Reid* case, *supra,* or otherwise to regulate a stevedore's responsibility.

The text of COGSA specifically limits its application to relations between cargo and ship: the Act does not, either by reference or implication, extend

its application to a stevedore. Where the terms of a statute do not include servants or agents of the carrier, the general rules of tort liability are applicable to actions against them.

Congress, in enacting shipping legislation, has shown an intent to restrict the protection of limited liability to the ship owner and to enforce the doctrine of independent liability against its agents and employees.

ARGUMENT

I.

The decision of this Court in *Reid* v. *American Express Co.*, 241 U. S. 544, embodies the rule of law applicable to this case.

In the *Reid* case, an automobile valued at $4,000 was shipped, without declaration of value, under an ocean bill of lading which contained a provision limiting the carrier's liability to $100. The automobile was damaged to the extent of $2,000 during discharge from the vessel, through the negligence of a stevedore employed by the carrier. The stevedore was held primarily liable for the full amount of the damages; the carrier was held secondarily liable to the extent of its limited liability of $100, payable only in the event the stevedore failed to satisfy the shipper's judgment.

This Court's decision as to the stevedore's full liability was based upon the rule that a tort feasor is directly and independently liable for his acts of negligence which this Court said in *Brady* v. *Roosevelt*

S. S. Co., 317 U. S. 57[illegible] (1943), "has long been imbedded in the law" (p. 580). In accord:

> *Quinn* v. *Southgate Nelson Corp.*, 121 F. (2d) 190, 191 (2 Cir.), (1941); cert. den. 314 U. S. 682.

The stevedore's position in the *Reid* case, both factually and legally, parallels that of the petitioner herein if it is assumed that the limitation of liability in the carrier's form of bill of lading which had not yet been issued for this cargo, and the terms of COGSA, were available to the carrier. In both cases the stevedores had no contracts with the respective shippers, nor did the stevedores' arrangements with the ocean carriers provide that they were to share the limited liability granted the latter.

The law which was applied by this Court in the *Reid* case was not changed by COGSA, except to provide a carrier with a statutory limitation of its liability of $500 per package. As the legislation which has been enacted since the *Reid* decision only provides a carrier with limitation of its liability for cargo damage, if petitioner is to prevail, it must show that Congress has changed the long established principle of a stevedore's independent unlimited liability for a tortious act.

As appears in the review of the provisions of the pertinent sections of COGSA and of the Congressional proceedings, discussed under Point II of this brief, there is nothing in the text of the Act or its legislative history that suggests Congress had any intention of modifying the ancient rule that a tort feasor is independently liable for his torts, without limitation.

II.

The Legislative history, as well as the text of COGSA, negatives any suggestion that the $500 limitation extends to stevedores.

Committee reports and statements of the sponsors of legislation are significant expressions of legislative intention. *Wright* v. *Vinton Branch*, 300 U. S. 440, 463-464 (1937); *Duplex Co.* v. *Deering*, 254 U. S. 443, 474-475 (1921).

Clear indication of Congressional intent as to the parties to be governed by COGSA is contained in the following statement by Senator White, who introduced the bill which initially bore his name:

> "I may say that one of the outstanding purposes of the proposed legislation is to increase the character and degree of responsibility of the carriers; and the bill was designed in large measure in the interest of the *shippers rather than of the carriers.* * * *"
>
> "* * * The legislation supersedes the so-called 'Harter Act' from the time the goods are loaded on the ship to the time they are discharged from the ship. Otherwise, *our law remains precisely as it is,* unaffected and unimpaired by the proposed legislation." *S. 1152, 74th Cong, 1st Session, 79 Cong. Rec., p. 13341 (Part 12) 1935.*

Further legislative support for respondents' submission that the provisions of COGSA were enacted solely for the benefit of water carriers and cargo

owners appears in H. Report 2218, 74th Cong. 2nd Session:

> "The purpose of this bill is to define by law the rights and liabilities of water carriers and shippers in foreign commerce. It fixes an irreducible minimum of immunity of the carrier from liability." (p. 1)

The language of Section 4(5) of COGSA as to the identity of the parties intended to be governed thereby, is equally specific designating only the carrier and the ship:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage * * * in an amount exceeding $500 per package * * *" (46 U. S. Code, 1304(5)).

Section 1 of COGSA defines a carrier as follows:

> "The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper" (46 U. S. Code 1301 (a)).

Similarly, clause 30 of the carrier's bill of lading herein specifically designates the carrier, and no other party, as beneficiary of the $500 limitation of liability, i. e.,

> "* * * and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per said unit * * *" (R. 18-19).

Clause 1 of the bill of lading contains the following definition of carrier—

> "The term 'carrier' used herein includes owners,

vessels, masters and charterers thereof, and any substituted and continuing carrier" (R. p. 31).

An examination of the records of the Committee hearings on COGSA, extending over a period of 15 years, has failed to disclose a single reference to stevedores suggesting that they were to receive the benefits accorded carriers in the Act.

The Harvard Law Review (Vol. 66; January 1953) in an article commenting on the *Collins* case, *supra*, and the relationship of stevedores to COGSA, expresses the clear import of the language of the Act and of the legislative proceedings, hereinabove quoted:

> "* * * Thus the Act would seem to apply only to those who are bound by the bill of lading, and neither statutory language nor legislative history suggests that its provisions should extend beyond these parties to agents such as defendants" (p. 530).

As petitioner's claim to limitation of liability is predicated upon Section 4(5) of COGSA, and the parallel limitation contained in bill of lading clause 30, which, by clear language, restricts the benefits of limited liability to the "ship", "carrier" and "charterer", it is submitted that petitioner, being a stevedore, is not entitled to the limitation of liability provided in COGSA and the bill of lading.

As it is a fundamental rule that a tort feasor must respond in full for his negligence (*Brady* v. *Roosevelt S. S. Co., supra*, p. 580), we submit that it should not be assumed that Congress legislated unwittingly upon such a question.

Moreover, a ruling sustaining petitioner's contention would be in derogation of the common law and, accordingly, the rule of strict construction should be applied.

Texas & Pac. Ry. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 437 (1907);
Shaw v. *Railroad Co.*, 101 U. S. 557, 565 (1879).

III.

Congress in enacting shipping legislation has shown an intent to restrict the protection of limited liability to the shipowner and to enforce the doctrine of independent liability against its agents and employees.

In the Limitation of Liability Statute (46 U. S. C. 182-195), which permits a shipowner to limit his liability to the amount or value of his interest in the vessel and pending freight, provided the loss was not occasioned by his privity and knowledge (Section 183), Congress specifically excluded the ship's officers and seamen from the benefit of the limitation (Section 187).* The effect of this legislation is to protect the shipowner from the negligence of its agents and employees to the extent of the value of the ship and,

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* "*Remedies reserved.* Nothing in sections 182, 183, 184, 185 and 186 of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel."

simultaneously, protect the shippers by preserving for their benefit the common law full measure of damages against the ship's agents and employees who are negligent.

In the instant case, the Court of Appeals quoted from *Brady* v. *Roosevelt S. S. Co., supra,* in support of its ruling:

> "if Congress had intended to make such an inroad on the rights of claimants it would have said so in unambiguous terms" (p. 581).

Respondents and the ocean carrier were the only parties to the bill of lading and proof of their intention that the contract should limit only the liability of the carrier is found in the definition of "carrier" in the lading, viz., "owners, vessels, masters and charterers" (R. 57). The designation of carrier, master and vessel and the absence of any reference to stevedores renders appropriate the application of the rule of construction, *"Inclusio unius est exclusio alterius."* If it was the carrier's intention to give stevedores the protection of the limited liability provided in the bill of lading, specific reference would have been made to it in the lading.

A decision directly in point involving the construction of Sec. 4(2)(a) of COGSA (46 U. S. Code, Sec. 1304(2)(a)), is *International Milling Co.* v. *S. S. Perseus,* 1958 American Maritime Cases 526 (E. D. Mich.) (not elsewhere reported).

IV.

Where the terms of a statute or contract, do not expressly include servants or agents of the carrier as beneficiaries of the latter's exemptions thereunder, the general rules of tort liability govern in actions against them.

The independent liability of an employee or agent of a shipowner, or other principal, without regard to such owner's contractual agreements with third parties has long been recognized. His liability arises out of the violation of the duty imposed upon him by the common law not to damage the property of others.

That rule was applied in:

Publicker Industries v. *American-Hawaiian S. S. Co.*, 78 F. Supp. 223, 226 (E. D. Pa. 1948), where a vessel in the course of undocking, struck and damaged an adjacent pier due to insufficient power of the tugs. The Court observed that a tug captain is liable where his negligence is shown notwithstanding the existence of contracts affecting the liability of owners or operators.

Parker v. *Bissonette*, 26 S. E. (2d) 497 (Sup. Ct., So. Car., 1943), a passenger traveling under a free railroad ticket containing a "non-liability" clause, was injured while being transported by bus from one railroad station to another, pursuant to a written contract between the bus operator and the railroad. The bus operator was not relieved of liability because the stipulation as to non-liability referred only to the railroad.

Pierre v. *Eastern Air Lines, Inc.*, 152 F. Supp. 486 (D. N. J., 1957), a personal injury action governed by the provisions of the Warsaw Convention (49 Stat. 3019). Plaintiff sued the air carrier and the pilot. Under the treaty, the amount of damages that might be recovered as a result of an airplane accident is limited (i.e. $8500, Article 22(1)). Held, treaty limitation was not available to pilot as its terms did not include servants or agents of the carrier, therefore, the general rules of negligence were applicable.

International Milling Co. v. *S.S. Perseus, supra*, presented a question of statutory interpretation of Sec. 4(2)(a) of COGSA (46 U. S. Code, Sec. 1304(2)(a)), which provides that

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
>
> (a) Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

Cargo was damaged by water as a result of an error in navigation. The shipper sued, among others, the master of the "Perseus". Held, master was not entitled to the protection accorded the carrier under that section as the provisions thereof are not intended to exempt masters as agents of the ship.

V.

The majority opinion in the *Collins* case is fallacious in reasoning and unpractical in result.

Petitioner predicates its claim to the benefit of the carrier's $500 per package limited liability on the majority opinion in the *Collins* case, which announced the principle that an independent contracting stevedore is but an agency employed by the carrier to satisfy its contractual obligations to the cargo owner; and that the stevedore, therefore, is entitled to the benefit of the bill of lading provision limiting recovery against the carrier to $500 per package.

The argument which is emphasized and reiterated in the briefs of petitioner and *Amicus Curiae, The National Association of Stevedores,* is that when COGSA was enacted

> "it must be that it was common knowledge that loading and discharging were carried on by expert stevedores. It must have been known also that under modern conditions the ship's crew could not possibly load, stow, and discharge the goods carried" (Petitioner's brief, p. 9).

Upon the foregoing premise, it is argued that petitioner loaded respondents' cargo in furtherance of COGSA and the bills of lading

> "as authorized by the Act and it should be allowed to benefit from the Act and the bills of lading in respect to the carrier's limitation of liability" (Petitioner's brief, pp. 9-10).

In advancing the foregoing contention, petitioner adopted the specious rationale of the majority judges in the *Collins* case, *supra,* (opinion, p. 897). Petitioner's conclusion that the parties to the contract of carriage contemplated the services of independent stevedores is unjustified, for, in normal course, a shipper is unaware and unconcerned as to who will physically load and discharge his cargo. If it was within the contemplation of the shipper and carrier that the services of an independent stevedore were to be used, it seems reasonable to inquire why some provision was not made in the bill of lading to protect the stevedore from the adverse effect of the ruling in the *Reid* case, decided 36 years prior to the *Collins* litigation.

If, as petitioner asserts, it was "common knowledge" that the services of stevedores were to be utilized, it must be further assumed that Congress, as well as this Court, similarly, were aware of that circumstance. Yet Congress made no provision in COGSA extending the benefits of the Act to stevedores; nor did this Court in its consideration of the extent of the stevedore's liability in the *Reid* case give the stevedore the benefit of the bill of lading limitation to $100.

As we have shown under Point II of this brief, the text of COGSA made no change in the existing law as to the common law rule of liability in respect of the negligent acts of an agent, so that the state of the law, at the time this Court decided the *Reid* case, was the same as at present.

The majority judges in the *Collins* case observed that an agent is not entitled to a principal's limitation

of liability if it is personal to the principal (opinion, p. 897). While we believe those judges erred in not excluding the stevedore's participation in the carrier's benefits, on all grounds, we submit that the language of Sec. 4(5) of COGSA (46 U. S. C. 1304 (5)), set in the background of the legislation of 1936, requires the construction that the $500 per package limitation is a personal exemption of the carrier. It seems clear that a contrary view would be in conflict with the stated purpose and text of COGSA.

The personal character of the $500 limited liability provision was the subject of an article in the Harvard Law Review (Vol. 66, p. 530)* which criticized the decision of the majority judges in the *Collins* case. The views stated in that article were accorded approval by the Appellate Court below (R. 57), which, in turn, affirmed the decision of the District Judge who said:

> "* * * the reciprocal obligations which COGSA imposes are personal to the ship and to the carrier and do not extend to the stevedore" (R. 32).

That decision was cited, with approval, in *International Milling Co.* v. *Perseus, supra* (opinion, p. 531).

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* "The court interpreted the Act (COGSA) as extending the protection of the agreement to defendant. However, the restrictions on agreements for limited liability between carrier and shipper are part of the regulation imposed by the Act on the rights and obligations created by the bill of lading. Thus the Act would seem to apply only to those who are bound by the bill of lading, and neither statutory language nor legislative history suggests that its provisions should extend beyond these parties to agents such as defendant" (p. 530). *Cf. Knauth Ocean Bills of Lading* 118-131, 270 (4th Ed. 1953).)

There were two non-maritime cases cited by petitioner (brief, pp. 12-13).

Schoeffer v. *United Parcel Service Co. of N. Y.*, 277 App. Div. 569 (1950) and *Employers Fire Ins. Co. of Cincinnati, Inc.*, 99 N. E. 2d 794 (1950), are State court decisions which arose out of loss and damage to furs while in the custody of truckmen who were employed to perform collection and delivery service, as provided in the fur storage company's contract with the owners. The truckmen were held to be entitled to the benefit of the limited liability provisions contained in the storage contracts. It is submitted that that type of action is readily distinguishable from the case here presented of a stevedore claiming the benefit of a carrier's statutory limitation of liability which, by the express terms of the statute, extends only to the carrier and the ship, the "carrier" being defined as the "owner or charterer" of the ship. (46 U. S. Code, Secs. 1301(a), 1304(5)).

The most meagre and unpersuasive authority is cited in the majority opinion in the *Collins* case in support of its ruling that a stevedore is entitled to the protection of a carrier's limitation under COGSA (opinion, p. 899). The only case cited by that court is *Herzog* v. *Mittleman*, 155 Or. 624, 65 P. (2d) 384 (1937). In that case the Oregon court construed a "guest" statute which provided that no person transported by the "owner or operator" of a motor vehicle, as his guest, shall have a cause of action against such owner or operator unless there be proof of "gross negligence". The Court ruled that the driver "guest" was the owner's agent and entitled to the owner's

immunities and, because plaintiff had failed to prove gross negligence, the suit was dimissed.

The guest driver, as the "operator" of the vehicle was a beneficiary of the protection referred to above under the express terms of the statute. If the contention is advanced that the decision in the *Herzog* case, *supra*, did not turn upon the defendant's status as an "operator", then in that event, the decision, we submit, is erroneous because of conflict with the decision of this Court in the *Reid* case, and the other authority cited under Points I, III and IV of this brief.

In the present case, petitioner does not have the advantage of express statutory protection under COGSA, as did the guest driver under the Oregon statute in the *Herzog* case. Such protection must be contained in the agreement under which exemption is claimed (See comment in *Harv. L. Rev.*; Vol. 66, 530).

Petitioner's claim to the carrier's limited liability must depend upon the provisions of COGSA. While Clause 30 of the bill of lading (R. 18) contains the same $500 exemption as Sec. 4(5) of COGSA, if the Act does not sustain petitioner's claim, the bill of lading provision would be unavailing because paragraph 37 of the lading provides that COGSA is paramount and any term of the lading inconsistent therewith shall be void (R. 19). Both COGSA and the bill of lading in the present case specifically designate the parties intended to be covered thereby and stevedores are not included in such designation.

Other than the *Herzog* case, *supra*, all of the cases cited in the Appendix to the brief of *Amicus Curiae, The National Association of Stevedores,* concern state court decisions, which dealt with non-statutory limitations. No case has been cited by, or on behalf of, petitioner where a party not designated in a statute has been given the protection of its benefits.

Petitioner herein has adopted the same tenuous argument which persuaded the majority judges in the *Collins* case, i. e., that this Court in the *Reid* case

> "did not pass on whether the limitation was available to the stevedores because the stevedores did not even claim it" (Opinion, p. 896).

In the *Reid* case, this Court ruled that the stevedore was primarily and independently liable in tort for the damage to the cargo resulting from his negligence, despite the bill of lading contract between shipper and carrier limiting the latter's liability to $100. The implied suggestion that the eminent judges who constituted the Court in that case, as well as the stevedore's counsel therein, failed to give the stevedore the protection to which petitioner in the present case contends such parties are entitled when performing services for a carrier, is wholly unwarranted.

The very absence of any precedent prior to the *Reid* case, and during the 36 year interval between that decision and the advent of the *Collins* case, is, we submit, clear indication that the Bar in general recognized that no such limitation was available in suits against a stevedore for damage occurring as a result of his negligence in the handling of cargo. The

stevedore in the *Reid* case did not claim the carrier's limited liability because there was no privity of contract with the shipper and, as Judge Holmes pointed out in his dissenting opinion in the *Collins* case, such claim would have been in derogation of the common law.

The case of *Elder, Dempster & Co., Ltd.* v. *Paterson, Zochonis & Co., Ltd.* (1924) A. C. 522; 18 Lloyd's Rep. 319, cited at page 14 of petitioner's brief, and emphasized strongly in the brief of *Amicus Curiae, The National Association of Stevedores* (pp. 9-11), has relation to the right of a shipowner to the protection afforded by a provision in the contract between the shipper and charterer relieving the latter from liability caused by bad stowage. The shipowner was accorded the protection, although not formally named in the contract.

The *Elder, Dempster* case, *supra,* was the subject of extensive review by the court of last resort of Australia in *Wilson* v. *Darling Island Stevedoring Co., Ltd.,* (1956) 1 Lloyd's Rep. 346 (High Court of Australia), and the majority judges were of opinion that the decision therein was not controlling in the situation of a stevedore claiming the protection of a carrier's bill of lading.

The *Wilson* case, *supra,* dealt with the right of a stevedore to the protection of a carrier's limitation of liability. The bill of lading provided that the carrier had no liability for goods prior to loading on, and subsequent to discharge from, the ship; and that during such periods goods in the custody of the carrier or its agents or servants were at the sole risk

of the shipper. The stevedore engaged by the ship's agents to discharge the ship damaged plaintiff's goods after discharge. The stevedore's claim for the benefit of the protection afforded by the bill of lading to the carrier or its agents, was rejected by the High Court.

In that case it was said (p. 364):

> "The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. He is engaged by the shipowner and by nobody else, and the terms on which he handles the goods are to be found in his contract with the shipowner and nowhere else. The shipowner has no authority whatever to bind the shipper or consignee of cargo by contract with the stevedore, and there is, in my opinion, no principle of law—deducible from the *Elder, Dempster* case, sup., or from any other case—which compels the inference of any contract between the shipper or consignee and the stevedore. If the stevedore negligently soaks cargo with water and ruins it, I can find neither rule of law nor contract to save him from the normal consequences of his tort."

In distinguishing the *Elder, Dempster & Co.* case, *supra*, the Court said (p. 358), that the *ratio decidenti* of the *Elder, Dempster & Co.* case is that the relations of the shipper and the shipowner, Elder, Dempster & Co. gave rise to a bailment which included exceptions and limitations of liability stipulated in the bill of lading which protected Elder, Dempster. In the course of an exhaustive review of the cases which

purported to apply, or expound, the *Elder, Dempster* case, it was said in the *Wilson* case (p. 359):

> "What has been supposed to be a principle involved in the *Elder, Dempster* case sup., (although there is a conspicuous lack of unanimity as to what that principle really is) has, as will be seen, been extended so as to give to a stevedore exemption from liability for negligence by virtue of a provision in a bill of lading to which the stevedore is not a party, and which is really no concern whatever of the stevedore. This appears to me to be a 'development' of the common law which is altogether out of character, and which is exactly the opposite of what one would have expected and felt to be justified. It is all the more remarkable in view of the fact that the modern tendency has been to expand the field of liability in tort."

It was also said, in referring to the *Elder, Dempster & Co.* case (pp. 364-365):

> "It may be remarked at once that if any of the noble Lords who took part in that case had in mind to lay down any general rule concerning the exclusion of common law liabilities, at least there is no trace of any intention to make an inroad upon any established principle, least of all the elementary general rule that the only persons entitled to the benefits or bound by the obligations of a contract are the parties to it."

In accord with the foregoing view is the recent case of *Bisso* v. *Inland Waterways*, 349 U. S. 85 (1955).

wherein this Court held invalid a provision in a contract of private towage which sought to exempt the tower from liability for its negligence. This shows the trend of the law that a tort feasor will not be permitted to escape liability for damage resulting from its negligence.

We submit that it is clear from the searching analyses of the *Elder, Dempster & Co.* case made by the justices in the *Wilson* case that the facts of petitioner's case herein do not bring it within the decision in that case.

Aside from the circumstance that the prevailing opinion in the *Collins* case is erroneous because (a) by Congressional intent and statutory enactment, the $500 limitation of liability of COGSA is limited to the carrier and, therefore, personal to it; and (b) the decision is in conflict with the long established rule of independent and full liability of an agent for his torts, the decision is additionally unsound in reasoning and result because of the impractical, unrealistic and absurd situations made possible thereunder.

Petitioner had no written contract with the ship or the carrier (R. 15). Its arrangement with the carrier was to perform stevedoring services, the charge therefor to be calculated on a weight or measurement ton basis (R. 31), no consideration having been given as to the amount of petitioner's possible liability in the fixing of the rates (R. 31). There was no provision to assume greater liability upon declaration of a higher value than $500 per package upon payment by the shipper of a higher rate for his services, as is the

obligation of the carrier under bill of lading clause 30, which begins with the statement that

> "In consideration of a choice of rates having been offered to the shipper by the carrier, it is agreed that in case of loss or damage to * * *" (R. 52).

Petitioner's services were to be performed without regard to the value of the cargo. Had there been an intention to include stevedores as a benefit party to the bill of lading it would have contained a provision for a choice of rates with corresponding increase of the stevedore's liability. Under the fixed rate schedule applicable to stevedores, based on tonnage or dimension (R. 54), petitioner agreed to load the cargo on the basis of the weight or measurement ton without any regard for the value of the cargo so handled (R. 15). It was not possible under its rate schedule for petitioner to assess its charges on a shipper's declared value, or a value representing the carrier's liability to the shipper for the latter's common law measure of recovery, i. e., actual loss (*San Giorgio I* v. *Rheinstrom Co.*, 294 U. S. 494, 496 (1935), as it had no alternative rates.

If the shippers herein had declared the actual value of the case of cargo, i. e., $48,000, and paid the carrier's tariff rate on such value, under petitioner's theory, it would have been liable for that amount, although in payment of its stevedoring services it would have earned the same sum of money as would be paid in respect of a loss under a $500 limitation of liability provision. Under the *Collins* decision,

petitioner herein would, despite its negligence, enjoy forgiveness for the difference between $48,000 and $500 without the payment of any consideration for such exemption. This serves to illustrate the fallacy of the majority decision in the *Collins* case that a stevedore is entitled to "such immunities of the principal as are not personal to the principal" (opinion, p. 897). The carrier herein enjoyed no such immunity as a choice of rates is a prerequisite to the validity of an agreement for limited liability.

As to rail carriers: *Hart* v. *Pennsylvania R. R. Co.*, 112 U. S. 331, 340-341 (1884).

As to water carriers: *The Kensington*, 183 U. S. 263, 277 (1902).

Under Point III of the brief of *Amicus Curiae, National Association of Stevedores*, there is a discussion of the dire economic consequences to which stevedores may be subjected should they be denied the protection of the $500 per package limitation; the contention being that a denial of the carrier's benefits under COGSA would in effect be a discrimination against contract stevedores. While the economical well-being of stevedores should not, in any event, be the determinative consideration of the issue in this case, contract stevedores carried on their business on a profitable basis for many years before the *Collins* case. As between the stevedore and the cargo owner, we think it apparent that the latter's economic interest is superior to that of the former, for any reduction in the claim accorded to the stevedore is, *pro tanto*, the shipper's loss—a loss attributable to the negligence of the stevedore.

A practical avenue of relief is available to stevedores to avoid such alleged discrimination. In place of being the recipient of a windfall which, in the present case, if allowed, would amount to $47,500—without the giving of any consideration therefor—stevedores can insure against the possibility of full liability as do carriers, by establishing alternative rates for increased declarations of value of cargo handled by them.

An equally absurd situation is presented by the bill of lading clause giving carriers the right to declare a general average. Such provisions are authorized by COGSA (46 U. S. Code 1305). They provide that in the event of accident, whether due to negligence or not, for the consequences of which the shipowner is not responsible by statute or contract, the cargo owners shall contribute with the shipowner in general average to the payment of any sacrifice, losses, or expenses of a general average nature that may be incurred.

Where vessel owner and cargo interests pay the proportionate sums due from their respective interests to the general average adjuster, and the adjustment is settled and the parties released from their obligations thereunder, the stevedore who caused the accident which gave rise to the general average, could claim that the settlement between ship and cargo inures to his benefit, and is a final and conclusive determination of all claims against him, as was done by the stevedore-respondent in the unlitigated case of *Atlantic Mutual Ins. Co. et al.* v. *John T. Clark & Son* (U. S. D. C., E. D. N. Y., 1955, Docket No. 20288).

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit denying to stevedore-petitioner herein the benefit of the $500 limitation of liability provisions of COGSA and the bill of lading, is in accord with the decision of this Court in *Reid* v. *American Express Co., supra,* and with other decisions, and should be affirmed.

Respectfully submitted,

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